

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In Re: NEO WIRELESS, LLC,) Civil Case No.
PATENT LITIGATION) 2:22-md-03034-TGB

MARKMAN HEARING
BEFORE THE HONORABLE TERRENCE G. BERG
UNITED STATES DISTRICT JUDGE
HEARING CONDUCTED VIA VIDEO CONFERENCE
ALL PARTIES APPEARING REMOTELY
Wednesday, June 21, 2023

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1 Wednesday, June 21, 2023

2 10:06 a.m. EST.

3 -- --- --

4 THE LAW CLERK OF THE COURT: Hear ye. Hear ye. Hear
5 ye. The United States District Court for the Eastern District
6 of Michigan is now in session. The Honorable Terrence G. Berg
7 presiding.

8 All ye having business before the Court, draw near,
9 give attention and ye shall be heard. God save the United
10 States of America, and this Honorable Court.

11 The Court calls case number 22-03034, In Re: NEO
12 Wireless, LLC, Patent Litigation.

13 Counsel, please place your appearances on the record.

14 MR. STEWART: Good morning, Your Honor. Chris Stewart
15 for the plaintiff, NEO Wireless.

16 Also speaking today with my firm on behalf of NEO
17 Wireless is Hamad Hamad and Bjorn Blomquist. They'll both be
18 using the same window whenever they speak.

19 THE COURT: Well, good morning to you, Mr. Stewart,
20 Mr. Hamad and Mr. Blomquist. And --

21 MR. STEWART: And I apologize, also -- I'm sorry, Your
22 Honor.

23 I meant to also introduce Mr. Cassady, our lead
24 counsel. He's also present. He has to travel today to a
25 pretrial hearing out of town tomorrow morning. So he might not

1 be able to remain for the entire hearing, but he is present in
2 the room now.

3 THE COURT: Thank you.

4 And welcome, Mr. Cassady, as well.

5 So let's go through our defendants here. So I'm just
6 looking at the docket. So how about for Honda?

7 MR. CORDELL: Good morning, Your Honor. It's Ruffin
8 Cordell and John Johnson on behalf of Honda from Fish &
9 Richardson.

10 THE COURT: Mr. Cordell, Mr. Johnson, welcome.
11 And from Ford?

12 MR. LeROY: Good morning, Your Honor. This is
13 John LeRoy from the firm, Brooks Kushman for Ford. And with me
14 today as well is Kyle Konz, K-o-n-z.

15 THE COURT: Mr. LeRoy, Mr. Konz, welcome.
16 How about for Volkswagen?

17 (No response.)

18 THE COURT: Do we have anyone from Volkswagen?

19 THE CLERK OF THE COURT: I'm seeing two hands that
20 have been raised. Let me admit them as panelists.

21 MR. MILLIKEN: Good morning, Your Honor, William
22 Milliken from Sterne Kessler Goldstein & Fox on behalf of
23 Volkswagen. I had not intended on speaking today which is why
24 I was not previously on video.

25 THE COURT: I understand. Well, welcome to you,

1 Mr. Milliken.

2 MR. MILLIKEN: Thank you, Your Honor.

3 THE COURT: Very good. Let's see. How about for
4 Toyota?

5 MR. ERICKSON: Good morning, Your Honor. Brian
6 Erickson and Ankur Desai with DLA Piper for Toyota.

7 Also joining us as an observer is Paul Steadman with
8 DLA Piper.

9 THE COURT: Good morning, Mr. Erickson.
10 And let's see here. How about for GM?

11 MR. HERRIGES: Good morning, Joe Herriges from Fish &
12 Richardson on behalf of General Motors. And with me is James
13 Huguenin-Love, who also will be representing today.

14 THE COURT: Welcome, Mr. Herriges and Mr. Love.
15 Do we have someone from Tesla?

16 (No response.)

17 THE COURT: How about from Nissan?

18 MR. HILL: Good morning, Your Honor. This is Reggie
19 Hill with Jenner and Block on behalf of Nissan, the Nissan
20 defendants. I also have my colleague, Peter Brennan, on the
21 screen with me.

22 Separately, my colleague, Paaras Modi, M-o-d-i --
23 Paaras is P-a-a-r-a-s -- is controlling the slides. I'll be
24 doing some of the speaking during the course of the hearing.

25 THE COURT: Very good. And welcome to you as well.

1 We don't have Mercedes-Benz anymore.

2 How about for FCA?

3 MR. TAPPARO: Good morning, Your Honor. Robert
4 Tapparo of Venable for FCA.

5 THE COURT: Good morning, Mr. Tapparo.

6 Let's see. Is there any other defendant who I have
7 not mentioned?

8 MR. JARVIS: Good morning, Your Honor. This is
9 Lawrence Jarvis for Tesla. I was not a panelist when you
10 asked. I was just promoted. I wasn't planning on speaking
11 today and I was not a panelist when you initially asked. But
12 this is Lawrence Jarvis on behalf of Tesla.

13 THE COURT: Very good. And welcome to you as well.

14 MR. JARVIS: Thank you.

15 THE COURT: All right. So, good morning. We have our
16 claim construction hearing on the docket and I'm going to be
17 hearing from both sides in this matter.

18 I think you've probably received our preliminary
19 construction that was sent out last night that we've been
20 working on here and I wanted you to know that that preliminary
21 construction is just that, it's preliminary. I don't want you
22 to think that it represents in any sense a final judgment or
23 decision by me regarding what the construction is that we
24 should apply to these terms. But I thought it might be helpful
25 to give you a sense of how it currently sits with me after

1 having looked it over and reviewed the materials. Because I
2 thought it might help you to focus your arguments. Don't feel
3 in any way that you're stuck with what I have in there, but let
4 it be a representation of the fact that I have looked at this,
5 I've given it some thought and we can get a sense of perhaps
6 how I view the issues at this stage without having had the
7 benefit of oral arguments through your presentations today.

8 I did want to thank a couple of people. I want to
9 thank our intrepid court reporter here who is going to be
10 hearing all these technical terms and getting them all down
11 accurately. I know you'll assist her regarding that and I
12 thank you in advance for that.

13 I want to thank Mr. Woloson, of course, our technical
14 advisor, who has been rendering invaluable service to the Court
15 and I'm very grateful for his assistance in helping me to
16 grapple with this area, which is very unusual and technical and
17 takes a lot of digestion and consideration and reading to try
18 to feel like we can get a grasp on what these terms are and
19 what the technology is.

20 I want to thank also Mr. Weissburg, who is our law
21 clerk, who is present today as well.

22 So you know you've each got about an hour and a half
23 today to go through the materials. We would like to proceed in
24 the order of the terms that we have presented in our proposed
25 construction to you.

1 So I thought it would be a good idea and you probably
2 saw in the E-mail that Mr. Woloson sent out last night that
3 each of you should be given the opportunity to decide who you
4 think should go first with these terms.

5 And how much time you think you'd need for them. Now
6 at first I see that you did agree to an interpretation of the
7 term "configure to". The terms "configure to" that are
8 contained in, I think, all the patents. So we don't need to
9 address that.

10 The next disputed term that we have is from the '366
11 patent. It's in claims 1 and 17 and that phrase that we're
12 talking about construing here is, quote, the ranging signal
13 exhibits a low peak-to-average power ratio in the time domain,
14 closed quote.

15 So which side here, plaintiff or defendant would like
16 to go first regarding this set of terms?

17 MR. HERRIGES: Good morning, Your Honor. This is Joe
18 Herriges for General Motors. The parties have agreed that we
19 will proceed first on this particular claim as we are
20 challenging its definiteness and NEO will proceed first on the
21 remainder of the claims at issue.

22 THE COURT: And how much time do you need, Mr.
23 Herriges?

24 MR. HERRIGES: I would expect on the order of 15 to 20
25 minutes, Your Honor.

1 THE COURT: All right. So that's a pretty hefty
2 amount in light of the time available, but this is perhaps one
3 of the knottier questions. So as long as you all know that
4 both sides gets or needs about that much time, then that does
5 take a chunk out of our hearing time today. But if that's what
6 you think you need and if it's acceptable to both sides, then
7 we can go ahead with that and we'll be relying on Mr. Weissburg
8 to keep time.

9 So why don't you go ahead and I'd be happy to hear
10 your oral arguments.

11 MR. HERRIGES: Okay. Let me share my screen here,
12 Your Honor. Just make sure you can see it.

13 (Slideshow displayed and shown throughout presentation.)

14 MR. HERRIGES: Your Honor, are you able to see the
15 slides now?

16 THE COURT: I can. Go ahead.

17 MR. HERRIGES: Wonderful. So as Your Honor said,
18 we're going to start here with the '366 patents and the term at
19 issue here really focusses on these words "low peak-to-average
20 power ratio in the time domain."

21 And I skipped ahead to Slide 11, where we're really
22 focusing on that.

23 We've got here on Slide 12, just to put a little
24 context, this is where the claim language appears in claim one.

25 But, again, moving to Slide 13, the key issue here is

1 really on this term "low".

2 The key dispute, which we have highlighted on the
3 bottom of Slide 13, is "whether the intrinsic record provides
4 objective boundaries for a 'low' peak-to-average power ratio."

5 Our position, defendant's position, is the answer to
6 that question is no and the term is otherwise not one that is
7 readily understood in the art and is, therefore, indefinite.

8 NEO, on the other hand, proposes two alternatives.
9 They propose a plain and ordinary meaning but without
10 indicating what that meaning is. And then they propose an
11 alternative, specific measurements, of -- and this is, if you
12 go to the very bottom here a peak-to-average power ratio of
13 9dBs, or decibels, or less, which it pulls from the extrinsic
14 *Baxley and You* articles.

15 There's really three important points that I want Your
16 Honor to take away from my presentation this morning. And I'm
17 going to take them in order. But they are first that the
18 intrinsic record does not provide any objective boundaries and
19 I don't think we're going to hear any serious argument from
20 either side that they admit it does.

21 The second point, Your Honor, is when the PTO focused
22 on this limitation in related patents, it either found it
23 indefinite -- or excuse me.

24 It did find it indefinite and NEO either acquiesced to
25 that finding by abandoning the application or removing this

1 specific claim limitation in order to obtain allowance.

2 And the final point, Your Honor, is that the extrinsic
3 evidence that NEO seeks to use here is irrelevant as a factual
4 matter and also legally improper because they seek to
5 incorporate specific measurements from extrinsic evidence,
6 which the federal circuit has, as a matter of black letter law,
7 said you just can't do in claim construction.

8 So with that in mind, Your Honor, I want to turn to
9 sort of threshold issues in the case law. And I have on Slide
10 14 here the sort of key case, which is the *Biosig versus*
11 *Nautilus* matter, where the Court makes clear "when a word of
12 degree is used, the court must determine whether the patent
13 provides some standard for measuring that degree."

14 And I think one thing the parties do agree on here is
15 that when we're talking about low, there's no dispute that that
16 is a word of degree. And so within this Universe of *Nautilus*,
17 we're determining whether the intrinsic record provides
18 guidance on that term.

19 More specifically, I think the *Berkheimer* case is an
20 important one to focus on where, as you see on Slide 15, we've
21 highlighted a couple of important facts here. The term at
22 issue there was that the "archive exhibits minimal redundancy."

23 So, again, a term of degree, minimal. And the federal
24 circuit made clear that the question is not what must exhibit
25 minimal redundancy but rather how much is minimal.

1 And I say that's important here because we hear a lot
2 from NEO that there's an understanding that you would compare
3 the baseline to the reduction in order to determine whether
4 something was low. And what *Berkheimer* tells us is that that's
5 not the relevant question. The relevant question is how low is
6 a low PAPR.

7 I'll be very brief on the sort of technical aspects of
8 this, Your Honor. But when we're talking about PAPR -- and we
9 laid this out in the technology tutorial -- essentially what
10 that means is, when you put off a signal, it has an average
11 power and it has a peak power. And the peak is -- those are
12 sort of the highest points indicated by the red line on Slide
13 16 in that right graphic. And the average power is indicated
14 by that black line.

15 And the peak-to-average power is expressed as a ratio
16 of decibels between that red line and that black line.

17 All right. So starting with the first important point
18 that I said I was going to make at the outset. And that is,
19 when we're talking about the intrinsic record here and what the
20 intrinsic record provides, what you see on Slide 17 is it.
21 What the intrinsic record says is limited to this paragraph in
22 the specification that relates to the time-domain signal
23 exhibiting a "relatively low peak-to-average power".

24 And it goes on from there to say that this can result
25 in improvements in power efficiency of the mobile station

1 transmission power amplifier.

2 But importantly, it doesn't say what constitutes low.
3 It doesn't provide any formula or any way to calculate from an
4 objective standpoint what constitutes low nor does it
5 articulate what would constitute an improvement or how much
6 improvement would be achieved by reaching the undefined low
7 quality that the patent speaks about.

8 And we have a good degree of expert testimony on this,
9 Your Honor, from both sides. What we hear from Dr. Axl,
10 defendant's expert, on Slide 18 is, as we cite in our brief,
11 "This disclosure does not clarify what the '366 patent
12 considers low PAPR." And indeed, adds additional uncertainty
13 by using phrase -- using additional terms of degree like
14 "relatively" and "improved" which are also undefined.

15 Of equal important, as I move to Slide 19, this is not
16 a term -- you know, you could imagine a patent might not define
17 every single term because some terms may be known in the art.
18 This is not one of those terms. The word "low" in reference to
19 PAPR is not -- as our expert Dr. Axl says here, it's not used
20 generally or in the context of the ranging signal. There's no
21 industry standard for making that assessment.

22 I'll move through this next slide relatively quickly.
23 But we also have testimony in the record here from an expert
24 who submitted a declaration, Mr. James Proctor, on behalf of
25 the Dell defendant who NEO had sued earlier and settled with

1 before the claim construction issue was resolved. But
2 nevertheless, as you see on Slide 20, indicating the same thing
3 as Dr. Axl does that there is no consensus threshold -- if you
4 look at paragraph 23 there, which we've highlighted.

5 "There is no consensus threshold defining what
6 peak-to-average average power ratios constitute 'low.'"

7 We turn to what NEO has to offer. I think this is of
8 equal importance. We talked both about what it means to be
9 low, but we also talk about where the baseline is. And even
10 NEO's expert concedes that there is not some defined baseline
11 from which we can determine whether a deduction has been low.
12 As he says in his declaration there are "different specific
13 implementations of these networks at issue that could have
14 different baseline PAPRs."

15 And that's consistent with what Dr. Axl says in
16 paragraphs 37 and 40 of his declaration where he says that a
17 baseline PAPR can be as high as 24 decibels.

18 Your Honor, moving to the what I think is the second
19 important point here. When the patent office focussed on this
20 claim language, this specific claim language in other
21 applications, in other related applications, it found that it
22 was indefinite.

23 You can see here in the *Child* application of the '366
24 patents, the patent office specifically says that a low
25 peak-to-average ratio is indefinite as it is unclear how low

1 the ratio should be to be considered, quote, low as claimed.

2 So that's independent from any arguments we're making,
3 which is the patent office making that determination. And then
4 we see here NEO doesn't fight this issue.

5 Moving to Slide 23, I've got on the left of Slide 23
6 an amended claim. And what they did in this amended claim is
7 they deleted that very language. They deleted this language is
8 in acquiescence with the PTO's order and were able to get
9 issuance only after deleting that language.

10 We see a similar thing in the '677 application, which
11 we also talk about in our brief. Where, again, on Slide 24,
12 we've got here a final rejection from the patent office where
13 in that second highlighted portion, the patent office says "it
14 is impossible to identify which results of the autocorrelation
15 are considered 'high' and which are considered 'low.'".

16 And here NEO subsequently abandoned this application
17 after the patent office made this determination.

18 I've gotten here just a sort of summary slide on Slide
19 25, Your Honor, just to put a little timing context into this
20 when the specific applications were filed, when the rejection
21 occurred and when the abandonment or the amendments occurred.
22 And I think an important thing for Your Honor to consider is
23 the timing of the *Nautilus* decision which is what is governing
24 us here, changing the standard from insolubly ambiguous to
25 reasonable certainty.

1 And you can see that the abandonments happened after
2 the *Nautilus* decision and the removal of the "low" PAPR
3 happened after the *Nautilus* decision. So that's -- so those
4 things happened after the operative case law that we are sort
5 of arguing about here was put into place.

6 Your Honor, the third and final point I want to make
7 is with regard to the extrinsic evidence that we see from NEO.
8 And just to set the table a little bit, the federal circuit in
9 the case I have on Slide 26, and many, many others, has said
10 that "it is improper to import a limitation into a claim where
11 the limitation has no basis in the intrinsic record."

12 And that's really what NEO is trying to do here.
13 There is no accepted definition of ER. There is no indication,
14 any intrinsic record how low needs to be low to be considered
15 low within the claims. And so what we see on Slide 7 (sic)
16 what NEO does is they go out and they find a couple of
17 articles, academic articles, and take the reduction in PAPR
18 that those articles were able to achieve from a theoretical
19 standpoint, and they try to read it into the claims.

20 So they say here on Slide 27 that a skilled artisan
21 would understand the relevant difference in PAPR of 3dBs for a
22 reduced PAPR to be low in the context of the patented claims.

23 So they don't cite to anything intrinsic. They don't
24 cite to any sort of standards or any sort of governing
25 definition. They cite to this Baxley and this You article.

1 And as a threshold matter, this is textbook reading in of
2 extrinsic evidence that has no basis in the claims.

3 But even more than that, these articles are really
4 irrelevant as a factual matter. What these articles are about,
5 Your Honor -- and I'm not going to get too deep into the weeds.

6 But there is a goal in the Baxley article to figure
7 out theoretically how to use certain mathematical techniques to
8 reduce PAPR as an absolute matter.

9 You know, if we increase the multiples -- if you're
10 looking at Slide 28 on the left there. If we increase the
11 number of times we multiply against the data from one to 10,
12 what happens? Well, what they found out is you see a reduction
13 in PAR across the board at different error rates. But in no
14 way are they saying that this PAR reduction that they were able
15 to find in this theoretical article is somehow governing of the
16 standard more generally or governing the way the '366 patent
17 approaches this. They're simply indicating that they were able
18 to lower the PAR using certain techniques. Not that this
19 constitutes a, quote, low PAR or that a skilled artisan would
20 understand that.

21 In fact, when you go sort of up the chain here from --
22 if you've got 10 to the negative four. And if you go up 10 to
23 the negative one, the reduction actually changes over time. So
24 it's not as if we can say that a 3dB reduction or a reduction
25 from 12 to 9 is something that's an objective boundary.

1 Because even looking at what they've provided, that boundary
2 shifts depending on the input and that's not something that is
3 consistent with reasonable certainty.

4 You see here, moving to Slide 29, again, Mr. Axl
5 disagreeing with Mr. Alberth that his publication would have
6 informed a skilled artisan about the meaning of low PAPR in the
7 context of the '366 patent.

8 The You article, I'm going to spend a little bit less
9 time on this, Your Honor, just for the sake of time, it's
10 simply because it suffers from the same deficiencies as Baxley.
11 The same issues apply here. It's a theoretical technique that
12 uses a different system than the claims system and it's based
13 on a series of assumptions that are theoretical and not trying
14 to say as an absolute matter what constitutes low, what
15 percentage of baseline constitutes low, where to start to
16 determine whether something is low. That's nowhere in the
17 Baxley article. It's purely extrinsic and purely
18 theoretical.

19 And again, moving to Slide 31 we have the same
20 testimony from Dr. Axl on this point that we saw with respect
21 to Baxley.

22 Your Honor, I think the point I really want to close
23 on here is what NEO is providing here is really a false choice
24 with no suitable outcome under their framework. On the one
25 hand, they're arguing that plain and ordinary meaning should

1 apply, but they don't say what that plain and ordinary meaning
2 is and I don't think there is any serious argument that there
3 is a plain and ordinary meaning here for defining what low is
4 in the art and because of that they're forced to pivot to an
5 alternative, which is equally flawed and equally counter to
6 black letter federal circuit law.

7 And that is they're seeking to read in these very
8 specific measurements from the extrinsic evidence and that is
9 textbook flawed logic from the context -- or from the point of
10 reading in extrinsic record. Nothing in the extrinsic says
11 anything about 9dBs or less being the threshold for low.

12 The only place you're going to see that is in the
13 extrinsic record, which as I've said earlier, does not even
14 provide a factually relevant framework for determining what
15 this term means as the '366 patent uses it. And for that
16 reason, Your Honor, we would urge you to find that it's
17 indefinite.

18 THE COURT: Well, thank you very much, Mr. Herriges.
19 A quick question for you. With respect to what a person of
20 ordinary skill of art would think about this term. Do you see
21 that as a factual question that the skilled artisan would
22 decide?

23 MR. HERRIGES: I don't think here it's a factual
24 question because I think the only evidence of record that a
25 skilled artisan would know that -- when determining whether

1 something is low you are making a comparison between a baseline
2 which to be clear is undefined and the particular system at
3 issue. I think that's the only sort of thing a skilled artisan
4 would understand and I don't think there's a factual question
5 about that particular issue. I think we would agree with that.
6 The problem is that there is simply -- there is no evidence
7 that there is any particular baseline from which to make that
8 determination or any threshold as to how low is too low.

9 So I don't think it's a factual question there because
10 there's simply no evidence to support what NEO is saying here.
11 I think it's a legal issue of deficiency of anything at all
12 that would lead to reasonable certainty.

13 THE COURT: All right. Thank you very much, sir.

14 MR. HERRIGES: Thank you, Your Honor.

15 THE COURT: So who would like to respond to this with
16 respect to the plaintiff?

17 MR. STEWART: Your Honor, Chris Stewart on behalf of
18 NEO will respond. And if I can share my screen, I can display
19 my slides here.

20 (Slideshow displayed and shown throughout presentation.)

21 MR. STEWART: Can you see that, Your Honor?

22 THE COURT: Yes.

23 MR. STEWART: Okay. So the dispute as Mr. Herriges
24 described it is slightly different than how I understood it to
25 be. They, obviously, are proposing that this is indefinite.

1 We propose the term requires no construction. It has a plain
2 and ordinary meaning and that it's not indefinite.

3 There's now been this allegation that our plain and
4 ordinary meaning proposal is deficient in some way, but I don't
5 think that's really borne out in the briefing so I want to
6 address that first.

7 We think there is a plain and ordinary meaning to this
8 term and we've described that in our briefing and the reason
9 why we only provided this more specific numerical definition as
10 an alternative is because we don't think you should adopt that.
11 We think that is only to the extent the Court feels that you
12 must provide a numerical boundary should you look to the
13 testimony of Mr. Alberth and apply and adopt our alternative
14 construction.

15 We think that the actual understanding of the person
16 of skill in the art as borne out by the record in this case and
17 the prior art and the intrinsic evidence is that it has a plain
18 and ordinary meaning. Someone of skill in the art would know
19 how to discern what a low PAPR is in the context of the patent
20 with reasonable certainty because they know, as Dr. Axl has
21 admitted, and as Mr. Herriges conceded at the end of his
22 presentation, that the way you tell something is low in the
23 PAPR context is by comparing it to a baseline.

24 So that is the reason why we didn't propose any
25 specific interpretation of what the plain and ordinary meaning

1 is because it's sort of implicit in the knowledge of one who
2 has skill in the art.

3 So the first slide I want to share with you --

4 THE COURT: Let me ask you: When you say that a
5 person of ordinary skill in the art compared to the baseline,
6 what is the baseline?

7 MR. STEWART: The baseline is the baseline PAPR in the
8 given system being implemented. And so I think you heard in
9 some of the commentary from Mr. Herriges coming from Dr. Axl's
10 declaration, defendant's expert, he never disputes
11 Mr. Alberth's testimony that the baseline PAPR of a given
12 system is a known knowable thing.

13 Right? He even says that there could be baselines in
14 certain systems that are high as 24dB. So that may be
15 different than the exemplary general baseline that was
16 identified by Mr. Alberth as an alternative argument, but it
17 stands for the proposition, the undisputed proposition that a
18 person of skill in the art can identify and know the baseline
19 PAPR of the system.

20 And so by virtue of that fact, by virtue of the fact
21 that the conceded knowledge of the POSA is sufficient to know
22 that baseline, you then also know that the POSA will be able to
23 tell what is lower than that baseline and, hence, arrive at the
24 low PAPR.

25 THE COURT: You can tell what is lower. But because

1 if the baseline is a certain number, then anything below that
2 would be lower. But is that enough?

3 MR. STEWART: Your Honor, I think it is. I think
4 particularly in the context of this claim language where it
5 talks about -- or specification where it talks about the basis
6 of a low PAPR being something that improves the power
7 efficiency -- we have testimony from Mr. Alberth explaining
8 that the reason you carry about power efficiency and the way
9 that you address power efficiency in the amplifier is by making
10 sure that you don't have to redesign your amplifier to
11 accommodate a special signal.

12 And he has numerous other opinions of his expert
13 testimony that goes unrebutted that a person of skill in the
14 art would know that just going below that baseline, ensuring
15 you don't have to specially design your transmitter or your
16 amplifier to accommodate this one signal is what a person of
17 skill in the art would understand to be a low PAPR in this
18 context.

19 Especially given how well-known this problem was in
20 OFDM systems, how well broad it was in the art. And that was
21 what I was going to show you on this next slide.

22 This is from Dr. Cimini's declaration, which was
23 defendant's expert in Volkswagen's IPR, this is cited in our
24 reply brief. These are descriptions of the prior art in that
25 IPR declaration where the prior artists are using the term low

1 PAR or low PAPR without any modifiers, without any thresholds
2 or clarifiers because it's just an understood term.

3 And if you look at the instance on the right from
4 the -- describing the Chayat reference, when he's describing a
5 sequence that can reduce the PAPR, he defines it as
6 "significantly less than the values typical for data."

7 So he's using the same metric, the same threshold that
8 we're talking about Mr. Alberth uses to say, okay, this is low
9 because it is, in fact, significantly less than the values
10 typical for data. So it's understood in the art that the way
11 you determine if a PAPR is low in this context, is by making
12 sure it is lower than the threshold for data or the baseline of
13 the system.

14 THE COURT: So your position is anything lower than
15 the average is low?

16 MR. STEWART: Yes, Your Honor. I think if you wanted
17 to adopt a sort of more express construction that captures the
18 plain meaning, I think that's right. If it's lower than the
19 baseline PAPR, which then accomplishes all the benefits
20 Mr. Alberth talks about of not having to redesign the system to
21 accommodate that particular signal, not increasing the power
22 inefficiency of the amplifier, then you have achieved a low
23 PAPR.

24 And that's consistent with the intrinsic record of the
25 patent where it specifically calls out that improving the power

1 efficiency of the amplifier is the purpose of having a low PAPR
2 signal and that's further borne out by Mr. Alberth's testimony.

3 One other thing I wanted to address, Your Honor, about
4 the three points Mr. Herriges made. The idea of the extrinsic
5 evidence being irrelevant, I think he focused on those articles
6 that Mr. Alberth cited. Which, as I mentioned, those were
7 examples of how a particular person of skill in the art can
8 identify a baseline and can achieve reductions below that
9 baseline. They were not intended to be expressly limiting
10 except in the alternative instance where you feel that's
11 necessary.

12 But as a general matter, this idea that extrinsic
13 evidence is irrelevant is, I think, just not borne out at all
14 by the cases and, in particular, I had not seen -- sorry. My
15 slides are moving on without me so I'm just going to pause them
16 here.

17 I have not seen the case that he's cited in the
18 slides, the *Seachange* case. I looked it up briefly before the
19 hearing. It's a case about just claim construction in general.
20 How you don't import limitations if they're not supported by
21 the extrinsic record. In general, we agree with that concept,
22 as we'll talk about a lot more later.

23 But in just a quick search, there's a case out of
24 Delaware, 14 F.Supp.3d. -- I didn't get the entire site. I
25 apologize.

1 But there are cases that talk about how extrinsic
2 evidence is essential to an indefiniteness inquiry because you
3 have to evaluate what a person of skill in the art would know
4 since you're evaluating what provides a reasonable certainty to
5 that person of skill in the art.

6 So to one of the questions you asked Mr. Herriges
7 about the fact question, I think the knowledge of a person of
8 skill in the art, the understanding of a person of skill in the
9 art is a fact question that defendants have to establish by
10 clear and convincing evidence and that is why the testimony of
11 Mr. Alberth, particularly the portions of it that were
12 un rebutted, that a person of skill in the art would understand
13 the low PAPR to be one below that baseline. It has to be
14 significant weight and their contrary -- or I guess lack of
15 contrary rebuttal testimony means they can't meet that clear
16 and convincing evidence burden to dispute that factual
17 understanding of a person of skill in the art.

18 THE COURT: So how is somebody reading the patent
19 supposed to know that that's what low means in this instance
20 and not something lower than just slightly below the baseline?

21 MR. STEWART: Your Honor, I think that goes back to
22 Mr. Alberth's testimony that this is a commonly understood term
23 in the art. And that's why I cited those instances from the
24 declaration of Volkswagen's expert where people in the art use
25 this term regularly. They already understand what that you're

1 seeing to achieve in lowering PAPR, especially within an OFDMA
2 system is reducing it below that Baseline.

3 The references to power efficiency in the patent view
4 the person reading it to, okay, this is -- they're trying to
5 achieve a low PAPR for the same reasons that are common to a
6 person of skill in the art in these types of systems and the
7 way they do that is by reducing it below that threshold to not
8 have to redesign the power amplifier.

9 So you start with the patent and it's teaching -- I'm
10 sorry, Your Honor. It looks like you might be speaking.

11 THE COURT: (Zoom audio muted.)

12 MR. STEWART: But you're on mute.

13 Your Honor, I apologize. I can't hear you. You're on
14 mute.

15 THE COURT: Thank you. I want to understand the
16 difference between your argument about whether this would be a
17 term that someone with the ordinary skill in the art would
18 understand versus its plain and ordinary meaning. So are you
19 saying the plain and ordinary meaning with low is that its
20 below the baseline or are you saying that only a person of
21 ordinary skill in the art would be able to know that in this
22 specific context that's what low means?

23 MR. STEWART: I think, Your Honor, I would say the
24 plain and ordinary meaning to a person of skill in the art is
25 that low in this context means lower than the baseline.

1 THE COURT: Why is it that NEO abandoned this in the
2 other patent cases that have been cited?

3 MR. STEWART: Your Honor, I can't actually tell you
4 the exact reasons why. I can tell you that those abandonments
5 are irrelevant and they're different applications for different
6 patents where for any number of reason, strategic or otherwise,
7 the patent team might have determined just not to fight that
8 particular term or they might have abandoned the application
9 that included that term for reasons completely unrelated to the
10 PAPR term. I honestly at this point can't speculate as to the
11 reasons why.

12 But I can tell you -- and it's cited in that slide
13 that I have here on the screen, also from that Cimini
14 declaration, is that when issuing the '366 patent, the patent
15 we are talking about, the examiner cited the low
16 peak-to-average power ratio in the time domain term as one of
17 the reasons for allowance.

18 So at the time of the '366 patent's issuance that
19 examiner understood the term and, in fact, even cited there is
20 a reason for allowance. So the fact that other examiners doing
21 a less searching inquiry without the benefit of expert
22 testimony in a complete record that you have before you here,
23 initially rejected that term just has no bearing on the inquiry
24 in this particular case for this claim in view of this full
25 record that we have.

1 But it definitely was not an acquiescence. I can at
2 least tell you that much.

3 THE COURT: Go ahead.

4 MR. STEWART: My colleague just pointed out to me
5 there's a case from the federal circuit called *Salazar* where it
6 holds that "silence in prosecution is not automatically
7 acquiescence."

8 So to the extent the Court wants authority for
9 understanding that concept, it would be the *Salazar* case in the
10 federal circuit.

11 THE COURT: I mean, I'll take a closer look at this.
12 But I think they were saying it was more than silence but
13 actually removed the terms and agreed with the claim of
14 choice.

15 MR. STEWART: In one instance I think that's right,
16 Your Honor. But still, removal of the term just to sort of
17 move through the prosecution and determine that you didn't need
18 that for allowability or for novelty is not the same as
19 acquiescing to it being indefinite. Right? It is still silent
20 as to the merits of the indefinite inquiry and that is why it
21 is not acquiescence in the conclusion. It was a decision
22 simply to just not have that fight for that particular patent.
23 So that's why we don't think that has any bearing on the actual
24 definiteness of the term in this patent.

25 Finally, Your Honor -- yeah, I think that covers about

1 everything that I wanted to say Though I went a little out of
2 order.

3 The final thing I'll say is that this expert testimony
4 that we're talking about, this idea that you can evaluate the
5 low -- whether a PAPR is low relative to a baseline is not just
6 from our expert, Mr. Alberth. It's also from defendant's own
7 technical expert Dr. Axl, as you can see on the screen where he
8 explicitly said that a person of person of skill in the art in
9 the field determines whether something is low by comparing the
10 PAPR from one signal to another signal.

11 So, again, even Dr. Axl is not saying you need some
12 additional information, some additional threshold of how much
13 lower than the baseline is low. He said that you determine if
14 it's low by comparing it to another signal or to a PAPR
15 baseline. So he is in a sense acquiescing to the same
16 construction that we're proposing here.

17 And the other citation here is to Dr. Cimini, the
18 technical expert in the IPR who uses the term low PAPR without
19 any additional caveats or clarifications or metrics. Because
20 it is an understood term in the art.

21 So unless Your Honor has other questions, that's all I
22 have.

23 THE COURT: No. Thank you very much. I appreciate
24 your argument as well.

25 And so I'm not sure if you all have budgeted rebuttal

1 time or not. I'm assuming not because we have so much to go
2 through.

3 MR. HERRIGES: Your Honor, if I can take one minute
4 with Your Honor's permission. I think that I can wrap up any
5 rebuttal I have.

6 THE COURT: I'll give you three minutes.

7 MR. HERRIGES: The first point I want to make, Your
8 Honor, this idea that lower is the same as low is absolutely
9 wrong. I mean, if they meant low, lower, they would have said
10 lower. They specifically chose the word low and they can't now
11 walk that back.

12 And if it were the case that just being lower was
13 enough, they would have said. Their alternative construction
14 is three below 12. Not 11 below 12. Not 11.9 below 12. It's
15 low. It's low. It's not just lower.

16 THE COURT: I mean, just to -- this starts to sound a
17 little bit nitpicky, but isn't relatively low the same as
18 lower?

19 MR. HERRIGES: Relatively low as they use it,
20 perhaps, Your Honor, but it does not -- it still doesn't answer
21 the question because relative to what and how low is relatively
22 to low. And I think maybe more importantly, relatively low is
23 not the same thing as lower, which appears to be what they're
24 arguing.

25 The second point is even if you accept all their

1 evidence as true -- and I'll focus on the Cimini declaration.

2 What Cimini said is that 3dBs -- and this is in
3 paragraph 54 of his declaration.

4 He says 3dBs could be low. So now we've got one
5 expert saying 3dBs. We've got another saying 9dBs and I have
6 Mr. Stewart saying it just has to be lower. What all of this
7 says is there is no reasonably certain standard in the art.

8 And the idea that a skilled artisan would just know is
9 not enough for reasonable certainty here. There needs to be
10 objective boundaries and because there aren't, the claim is
11 indefinite and we would urge Your Honor to find that.

12 THE COURT: (Zoom audio muted.)

13 MR. HERRIGES: I apologize, Your Honor. You're on
14 mute.

15 THE COURT: Thank you very much, Mr. Herriges. I
16 appreciate your argument as well.

17 So let's move on, then, to the third set of terms here
18 that we have which is also from the '366 patent and I'm going
19 to quote that from claims one and 17. And the terms are,
20 quote, a ranging sequence selected from the set of ranging
21 sequences.

22 And so according to what you had indicated to me
23 previously, we would then turn to Mr. Stewart to address this.
24 How much time would you like, Mr. Stewart?

25 MR. STEWART: Your Honor, simply because I'll make a

1 few introductory remarks as part of this term, I think 10
2 minutes.

3 THE COURT: Go ahead.

4 MR. STEWART: I'll share my screen again.

5 (Slideshow displayed and shown throughout presentation.)

6 MR. STEWART: The term we're talking about now is
7 selected from a set of ranging sequences. As you know, we
8 propose that it doesn't require any plain and ordinary meaning.
9 I think your preliminary construction is consistent with that.
10 The defendants want to essentially limit the term "selected
11 from" to "selected by a particular entity", namely the mobile
12 station, from a set of ranging sequences.

13 So before diving in to the specific arguments, I
14 thought if we just talked about indefiniteness, I would
15 reorient a little bit more on the traditional claim
16 construction concepts that are going to come up in this term
17 and several others here on out.

18 A particularly important thing I think in this slide
19 on the screen, this sort of decision tree for claims
20 construction, is that the first step is always to determine is
21 there a plain and ordinary meaning to the term in view of the
22 specification. That doesn't mean looking at whether there has
23 been disclaimer or disavow or lexicography or some sort of
24 narrowing of the well-understood meaning. It's simply to
25 evaluate is there already a known meaning. And sometimes in

1 certain cases you have to look at the patent specification just
2 to even be able to ascertain the claim meaning because the
3 words don't have a commonly understood meaning or, as quoted
4 here on the screen in *Embrex*, the construction of claims can
5 sometimes just be a way of elaborating the normally tersed
6 claim language. Not to change the scope of the claims, but
7 just to make them more clear.

8 There are going to be a couple of terms we talk about
9 today that fall into that category where we're just elaborating
10 on the existing scope of the plain and ordinary meaning.

11 What you're more often going to see, though, is under
12 the guise of just interpreting the term in light of the
13 specification in the standard *Phillips Embrex* type way,
14 defendants are going to look at the specification and specific
15 embodiments in the specification and try to narrow the plain
16 and ordinary meaning to exclude something. That can only be
17 done in two context -- and this is clear in federal circuit
18 law -- either in lexicography, which is quoted from *Phillips* on
19 the left -- where there's a clear definition and I don't think
20 we have any arguments in this case that that's happened.

21 Or on the right in the case of clear and unmistakable
22 disclaimer. A clear disavowal that the patentee is entitled to
23 less than the full scope of the plain language.

24 So in all of these terms where we're looking at
25 particular descriptions in the specification or embodiments in

1 the specification to try to create a limitation and reduce the
2 scope of the claims, it cannot simply be for context. You
3 can't simply look at the specification and say, "Well, I know
4 this has a plain meaning, but I need to look at it in the
5 context of the spec."

6 That is only possible if there's not a plain meaning
7 on the face of the term. If you're trying to narrow the scope
8 of the term from its plain meaning, you're doing a disclaimer
9 and *Thorner* has said that that's an exacting standard. It's
10 not probably too far off from the clear and convincing evidence
11 standard we talked about in the indefinite.

12 So that's just one thing I wanted to focus on briefly
13 as it comes up in a lot of these terms. This is a recent case
14 from 2019, *Continental Circuits* cited in our briefing. Our
15 firm is actually a part this case. Where even in the face of a
16 single embodiment being disclosed throughout the entire
17 specification, even in the face of references to the invention
18 in discussing that embodiment, and I think they even
19 distinguished prior art by discussing the specific embodiment.

20 In the prosecution history, the federal circuit still
21 reversed the district court who imported that embodiment into
22 the claims when it was inconsistent with the plain meaning of
23 the claims which didn't have that limitation on the face.

24 So in recent cases especially, the most recent federal
25 circuit case on this matter, they've been very consistent that

1 the only time they look at the specification and embodiments in
2 the specification is like in these cases cited by defendants
3 where this is no plain and ordinary meaning or it doesn't carry
4 an accepted meaning for one of skill in the art.

5 So I apologize for waxing poetic there a little bit.
6 But the main point is in all of these materials we have to
7 understand whether we're actually interpreting a term that
8 doesn't have a clear or plain meaning in which case you maybe
9 can look at the specs if you have to to find guidance. But
10 where you have a plain meaning that's well understood, you
11 cannot import a limitation from the specification, and it would
12 be legal error to do so unless it's clear and unmistakable.
13 They have to be words of exclusion and restriction not just
14 consistent embodiment descriptions that are consistent with
15 that limitation.

16 So with that preamble, the issue in this particular
17 claim with respect to "selected by" is relatively
18 straightforward. The words "selected by" they're just like
19 "chosen from" or "coming from" a set of sequences. They have a
20 plain and ordinary meaning that is unmistakable in the fact
21 that it does not specify an entity doing the selecting. And
22 you can see that in just the structure of the claim itself
23 where -- this is claim 17 from the patent method claim. It's a
24 method of transmission by a mobile station and then there are
25 explicit method steps that must be performed by the mobil

1 station such as transmitting the data signal, transmitting a
2 ranging signal, but then there's this wherein clause where
3 you're no longer describing the actual method steps performed
4 by the mobile station, you're describing characteristics of the
5 different components of the method. And that is where you see
6 in that first wherein clause that the ranging signal is formed
7 from a ranging sequence selected from a set of ranging
8 sequences.

9 It's agnostic to whether it is selected by the mobile
10 station or by the base station and I think contrary to what
11 you'll see in the defendant's presentation, there is nothing
12 about random access that mandates that the mobile station has
13 to necessarily select that sequence in order to use it to form
14 the signal that the mobil station sends.

15 As Mr. Alberth says in his declaration, it's commonly
16 understood that the base station can send a particular sequence
17 and say, "Hey, if you want to connect to me, you need to use
18 this sequence." And then the mobile station can still do every
19 step in this claim that it's required to which is use that
20 provided sequence to form the signal, transmit the signal and
21 otherwise -- the claim.

22 So as your preliminary construction knowledge is I
23 think this is entitled to plain and ordinary meaning. It
24 should not be limited to just performance by the mobile station
25 because that is a reduction in the scope of the ordinary

1 meaning of this term and would require unequivocal disclaimer,
2 which is not present. Even if the only embodiment explicitly
3 discussed in the spec shows the mobile station during this.

4 And that's all I have, Your Honor.

5 THE COURT: All right. Thank you very much.

6 And who would like to address this on behalf of the
7 defendants?

8 MR. DESAI: Thank you, Your Honor. This is Ankur
9 Desai at DLA Piper for the Toyota defendants. I would like to
10 address this term.

11 THE COURT: You may proceed.

12 (Slideshow displayed and shown throughout presentation.)

13 MR. DESAI: Sharing my screen here. Hopefully it's
14 coming up.

15 Your Honor, the issue presented here -- and you see
16 the term again that we've just been talking about a "a ranging
17 sequence selected from a set of ranging sequences."

18 The key dispute between the parties here is
19 really -- you know, and the parties agree to use this phrase to
20 represent the dispute here. But the reality is there's not
21 disagreement about the meaning of this particular phrase. I
22 think the parties agree on what selects mean and they agree on
23 what a ranging sequence means.

24 The focus of the dispute is how this phrase operates
25 in the context of the claim language and that's what I would

1 like to focus on.

2 In particular, NEO takes the position that it's
3 advancing plain and ordinary meaning. But the reality is it's
4 brief is quite clear that its interpretation goes far beyond
5 that. NEO's interpretation is, frankly, unlimited and abstract
6 and I'd like to focus on that. I think this parting here is
7 the same one that Your Honor has likely seen. We've
8 illustrated in both to the asserted claims on this slide. And,
9 you know, the '366 patent claim's a mobile station. You see
10 that in the preamble of claim one. It ends with the "mobile
11 station comprising." That was not highlighted on NEO's slide.
12 But that's critical.

13 The '366 patent does not claim some other entity. It
14 does not claim the base station. And the structure of the
15 claims accords and you see that in both of the asserted
16 independent claims.

17 In both preambles, we see that the communication is
18 going from the mobile station to the base station.

19 In the next clause of both claims we see the data
20 signal that is being sent to the serving base station.
21 Subsequently, the ranging sequence being transmitted to the
22 serving base station.

23 And it's in that context, Your Honor, that the nested
24 clause that we're looking at here is found. And, you know,
25 that context makes a hundred percent clear that even though

1 this verb "selected" is a passive voice verb, the context makes
2 clear that that selection has to happen by the mobile station.
3 The reason is that it's the same ranging signal that is being
4 sent by the mobile station to the base station.

5 Now, by contrast NEO, as I say, is sort of in the
6 guise of plain and ordinary meaning advancing a abstract and
7 unlimited interpretation. We've put a few selections from
8 their brief that really make this clear. You know, all of
9 NEO's arguments and, frankly, their entire brief is directed to
10 selection by the base station. But that's merely convenient
11 for NEO's infringement positions. There's nothing in the
12 patent that could select -- you know, that could limit this
13 selection to the base station and NEO admits that.

14 I think NEO's position, as you see here on the screen,
15 is it doesn't matter who or what selects the ranging sequence.
16 They say that other entities could do so and they provide no
17 definition for that and the reality here, Your Honor, is there
18 are a finite number of ranging sequences and merely adopting
19 the plain and ordinary meaning without countering those
20 arguments by NEO or addressing them raises validity questions
21 that were not briefed by the parties. You know, NEO's expert
22 refers to an example specification that I'll address further,
23 but in that example it's a selection between one and twelve.
24 And merely choosing a random number between one and twelve is
25 an abstract idea. It is not patentable.

1 And, you know, reducing the claim language to that
2 degree of that abstraction is a serious problem as far as the
3 validity of this claim. That interpretation, Your Honor, also
4 flies in the face of what the patent teaches. And here we've
5 provided a -- really the only part of the specification that
6 addresses this issue. It's abundantly clear. It says the
7 mobile station chooses the ranging sequence. It subsequently
8 uses that sequence to identify itself.

9 And, you know, defendants presented in our brief case
10 law to the effect that this sole embodiment is highly
11 indicative of the scope of the claims, that it is what a person
12 of ordinary skill would use to ascertain the scope of that
13 claim.

14 I'd like to address, Your Honor, the points that NEO
15 has made and NEO's counsel made in relation to the relevant law
16 here. As a starting point, they make the point that, you know,
17 only if there's no plain and ordinary meaning can these, you
18 know, references to the specification become relevant and, Your
19 Honor, that's exactly the case. Merely saying that they're
20 advancing the plain and ordinary meaning is not enough. They
21 have not said what the plain and ordinary meaning is and the
22 only interpretation they've offered is, frankly, utterly
23 indefinite, as we showed on the previous slides. Their brief
24 makes clear that they think that's selection by anyone or
25 anything.

1 You know, I'd also like to address the *Thorner* case.
2 That's one that NEO cited on the reply and we provided the full
3 quotation from *Thorner* here. I would like to be clear that
4 from an analytical perspective, defendants do not believe this
5 is a Lexicographer exception issue and the reality is, you
6 know, as the *Thorner* case makes clear, it's the context of the
7 specification that matters here and that's the context that we
8 have provided. You know, and again, as NEO's counsel said,
9 this is not an issue of disclaimer either.

10 Your Honor, this slide just shows visually what we've
11 been talking about here. This shows the relevant language in
12 isolation. You know, seeing this in the context of the broader
13 claim makes clear that the flow of communication has to be, you
14 know, from the mobile station to the base station. We showed
15 that previously and we've just called out that the ranging
16 signal here is exactly the one that's referred to above that's
17 being transmitted by the mobile to the base station.

18 The ranging sequence forms that ranging signal.

19 THE COURT: Is there another way that the ranging
20 signal could be selected?

21 MR. DESAI: Your Honor, that's exactly what I would
22 like to get to next, and I think the reality is doing that
23 would pose a very significant technological problem. That's an
24 issue that was addressed --

25 THE COURT: Regardless of whether it poses a

1 technological problem, if there's another way that the ranging
2 sequence could be selected, and this language does not
3 specifically say that this ranging signal -- I was saying if
4 this ranging signal can be selected by some way other than by
5 the mobile station, then why should the claim be limited as
6 you're suggesting that it should when the language itself
7 doesn't do that?

8 MR. DESAI: Your Honor, the answer is it cannot be
9 selected in a way that identifies the mobile station which is
10 what the claim language requires the sequence to do. And you
11 see that called out here on the screen.

12 Let me explain a little bit further. I think
13 defendant's expert really highlights this in our -- in his
14 declaration that was attached as an exhibit to the brief.
15 NEO's expert has -- first of all, NEO's expert has no support
16 for their position in the intrinsic record and as a result
17 looks to an unrelated specification, something that is not at
18 issue in this case.

19 What they point to is a preamble signature. That
20 preamble signature is selected by another entity, but it does
21 not identify the mobile station and indeed it cannot.

22 And just going back, that's exactly what this sequence
23 needs to do in the context of the claim language.

24 Now, by contrast, that same technical specification
25 does include a signature that does identify the mobile station

1 and that is selected by the mobile station. Indeed it has to,
2 Your Honor. That selection by the mobile station is necessary
3 in order for that signature to be able to identify the mobile
4 station.

5 I would just reiterate, Your Honor, that there is a
6 broader issue. And, again, this is seen in NEO's expert
7 declaration and we've highlighted the language here at least.

8 All of the arguments both in NEO's brief and by their
9 expert are directed to this possibility that a base station
10 could do this selection, but that's not NEO's position. And as
11 we've made clear and as is shown here on the slide, their
12 position is that any other entity could make that selection.
13 The reality is that the patent provides no description
14 whatsoever of how another entity could make that selection in a
15 manner that identifies the mobile station.

16 This presents, as I say, a technological problem, but
17 also, as alluded to before, a validity problem as far as sort
18 of the broad and abstract scope of that type of selection.

19 The reason -- and I'll briefly sort of elude to the
20 technology tutorial that we provided Your Honor previously,
21 both the high level and the patent specific technology
22 tutorials. The '366 patent talks about random access, Your
23 Honor, and as we gave the example previously that random access
24 occurs, for example, when a user turns on a mobile phone after
25 their plane has just landed, that is the process by which

1 connection is established for the first time.

2 And so the reason that NEO's proposal is really a
3 problem from a technological perspective, is there is no
4 previous communication that can be relied on here. If some
5 other entity is making the selection, there's no way for that
6 other entity to provide that information to the mobile station,
7 which, again, the claims make clear, the mobile station is the
8 entity that must then ultimately send the ranging signal.

9 So without that missing link, there is no written
10 description for that proposal. As we showed previously, the
11 written description that does exists stands squarely for
12 the -- it is one sentence and it says "the mobile station
13 chooses the ranging sequence."

14 And just to make it clear, the '366 patent, you know,
15 accords with this. The '366 patent is describing this random
16 access process and it agrees -- you know, the language of the
17 patent is clear that it is talking about establishing that
18 communication in the first instance.

19 THE COURT: And are there some instances in which,
20 let's say the cell tower could send out the ranging sequence of
21 some kind that the mobile device would receive?

22 MR. DESAI: Your Honor, it's possible and it would be
23 an invention that is not claimed by the '366 patent. It is
24 nowhere --

25 THE COURT: I know they're not claiming that. I don't

1 suggest that they're claiming that. I'm just suggesting that
2 they may want to have what they are claiming be able to form a
3 ranging signal from a ranging sequence that's selected by
4 something other than their own mobile station.

5 MR. DESAI: Your Honor, I think there are a number of
6 ways to articulate the problems with that solution, but we
7 think the written description is the clearest one. There is no
8 written description whatsoever of what that process would be.
9 If another entity is to make that selection, that selection
10 needs to then be consistent with what the claims do require,
11 which is that the mobile station subsequently sends the ranging
12 signal. So I think Your Honor is correct that that selection
13 is a possibility. What's missing and what NEO's brief does not
14 explain and does not even attempt to explain is how that entity
15 subsequently conveys that ranging sequence to the mobile
16 station. And that's the written description problem that would
17 be posed if Your Honor were to accept the, you know, broad
18 interpretation that NEO is advancing here in the guise of plain
19 and ordinary meaning.

20 THE COURT: All right. Well, this written description
21 may be a different issue, but perhaps Mr. Stewart will address
22 that.

23 Is there anything further you wish to add, Mr. Desai?

24 MR. DESAI: Your Honor, I would just conclude, as you
25 say, the written description problem is an issue which the

1 parties have not briefed is the validity issue that I think is
2 posed if NEO's interpretation is accepted without further
3 clarification. The mere selection of a random -- a number
4 between one and ten is simply an abstract idea, and NEO's brief
5 makes clear that that's what they propose. Furthermore, that
6 that selection can be made by anyone or anything. That is not
7 a patentable subject matter.

8 Thank you, Your Honor.

9 THE COURT: Thank you, sir.

10 All right. Would you like a few minutes, Mr. Stewart?
11 I'll give you three minutes.

12 MR. STEWART: Thank you, Your Honor. First the claim
13 language that is selected from -- if you say in a patent that
14 a, you know, a hammer head is made of metal, it's not
15 indefinite. It doesn't have a 101 problem, it doesn't lack
16 written description because a person skilled in the art of
17 hammers understands what it means for them to be made of metal
18 without understanding who the manufacturer was of the
19 particular metal head that is on the hammer. I think it has a
20 plain meaning to just say select from, regardless of specifying
21 the particular entity during the selection. We have identified
22 --

23 THE COURT: Now, how do you address the sort of
24 syntactical arguments that have been made that when you read
25 this, it looks as if you are talking about a mobile station

1 selecting the ranging sequence?

2 MR. STEWART: Your Honor, I think that goes back to
3 the point I made on my opening remarks. When you look at the
4 claim structure, it's actually the opposite. The syntactical
5 structure of the claim has specific language when it's
6 identifying what the mobile station is doing. The method
7 comprising the mobile station transmitting or a particular
8 signal or transmitting a ranging signal. When it talks about
9 the selection, it doesn't do so.

10 It knows how -- in the same claim it knows how to
11 structure a syntactical phrase that would have said "the method
12 comprising the mobile station selecting a sequence from a range
13 of sequences." And instead of using that language it opted for
14 the more passive, using a signal or -- or sequence that is
15 selected from a set of sequences.

16 Mr. Alberth has explained that there are multiple ways
17 to do it. They quibble with the particular evidence he cited,
18 but they don't dispute his overall point, which was that a
19 person that's skilled in the art would have known that the base
20 station should do the selecting.

21 And the other arguments you heard from Mr. Desai were
22 really infringement arguments. He's saying it might be hard to
23 show infringement of the claim if it's the base station doing
24 the selection instead of the mobile station. That's not a
25 claim construction issue and it's the same thing with his

1 written description argument, which is sort of another semantic
2 thing in a lot of their arguments in this case. That's a
3 defense that they have to meet by clear and convincing evidence
4 and present to a jury based on the terms that are properly
5 construed with the plain and ordinary meaning. We are ready to
6 meet that challenge. We think all the instructions that we
7 proposed are adequately described. But the fact that there
8 might hypothetically be a written description argument they
9 raise somewhere down the road based on the claim construction
10 is not a reason to depart from the plain meaning of the term.

11 THE COURT: All right. Thank you very much, sir.

12 So our next term that we have here is from the '908
13 patent and it has the following terms that I'll, quote:
14 "Wherein the portion of the frequency band used for
15 transmission of the random access signal does not include
16 control channels."

17 And so the parties take different positions with
18 respect to this language. And so would that be Mr. Stewart
19 again addressing this?

20 MR. STEWART: Yes, Your Honor. That's me again.

21 THE COURT: How much time?

22 MR. STEWART: I'll hand off the mic eventually.

23 THE COURT: How much time do you need?

24 MR. STEWART: This one I think, five minutes.

25 THE COURT: Go ahead.

1 (Slideshow displayed and shown throughout presentation.)

2 MR. STEWART: So one more time sharing my screen.
3 Your Honor, you identified the dispute accurately. The
4 question is really whether when the patentee said "control
5 channel" did it actually mean "control information?" Because
6 when you really look at the defendant's proposal, they define a
7 control channel as a channel care and control information, but
8 that really just collapses in on itself. And what they're
9 saying is that if the random access signal overlaps with
10 control information at all, it would not infringe this claim.

11 So by narrowing the scope -- sorry. Broadening the
12 scope of this negative limitation, they're essentially
13 narrowing the scope of the claim as a whole.

14 The obvious reason -- the straightforward reason why I
15 think the Court's construction is right to not import this idea
16 of control information into the claim language is that control
17 channel is a commonly understood term in the arts. Mr. Robert
18 said so. Their own high-level technology tutorial said so.
19 They explained that when the base station communicates with the
20 UE, it groups defensive information into channels based on the
21 type of information.

22 So in their briefing, they bemoan this idea of a
23 primary purpose test that we're allegedly placing. But we're
24 importing no such test. We're just using what they admit is
25 the common understanding of a person skilled in the art, mainly

1 that wireless communication systems contain channels that are
2 grouped based on the type of information.

3 There is often -- "frequently used channels include a
4 physical downlink control channels."

5 There are also uplink control channels, et cetera.
6 The point being that a person skilled in the art would know
7 that a control channel is an actual thing. An actual channel
8 designated for control information in a wireless communication
9 system and would not just encompass any sequence that has
10 control information.

11 The upshot, right. The reason they want this is
12 displayed on this slide. The red is intended to designate a
13 hypothetical control channel, an actual control channel where
14 the red is fully control information. The green is a
15 hypothetical random access signal. The claim requires that the
16 green random access signal not overlap with the frequency band
17 used for control channels in the red. If instead the term is
18 broadened to just any control information, then as you can see
19 on this slide, if there's one red dot in the portion of the
20 frequency where the green is, that contains one single piece of
21 arguable control information, then the defendants are avoiding
22 infringement.

23 So that's why they want this, it's an extensive
24 narrowing of the claim language and we think you should just
25 adopt the plain and ordinary meaning.

1 The only comment I make about the proposed preliminary
2 construction by the Court is that while we do agree that this
3 is a control channel, it's not just control information and
4 your proposed construction isn't really something we would
5 dispute on its face. We agree that this would be a
6 multi-carrier control channel. We do just generally oppose the
7 importation of any limitations from the speculative purported
8 embodiments into the claim language. So we would oppose the
9 inclusion of the MC, multi carrier control channel not because
10 it's a really a substantive issue that matters for this term,
11 but because, you know, matters more for other terms and it's
12 part and parcel with this idea that even if the specification
13 specifically talks about a multi-carrier control channel in the
14 embodiments, there is no clear construction (phonetic) to this
15 claim.

16 And that concludes my argument, Your Honor.

17 THE COURT: Can you clarify exactly -- are you saying
18 that you agree with the proposed construction of the Court or
19 you would amend it in some way?

20 MR. STEWART: Your Honor, we would prefer it would
21 just be plain and ordinary meaning. That the control channel
22 already had its own meaning and it's well known to a person
23 that's skilled in the art and no modifiers need to be at all.
24 So we would oppose the addition of multi-MC, multi-carrier in
25 front of the words, "control channel," but as a substantive

1 matter in this particular term, I'm sort of alerting you to the
2 fact that that's as significant as it might be in other issues.

3 (Court reporter imposes clarification.)

4 THE COURT: Thank you very much, Ms. May.

5 And so who would like to respond to this argument
6 regarding the issue of control channels?

7 MR. DESAI: Your Honor, Ankur Desai for the Toyota
8 defendants. I'll respond here as well.

9 THE COURT: Okay.

10 (Slideshow displayed and shown throughout presentation.)

11 MR. DESAI: Once again, just sharing my screen. I'll
12 skip ahead to the slide for the term at issue here. I think,
13 Your Honor, in light of the Court's preliminary construction,
14 I'd like to make my comments brief and primarily respond to
15 what I heard NEO's counsel say here.

16 I think the crux of this issue and the key dispute as
17 you see on the slide is simply whether the ordinary meaning of
18 control channels is, as defendants have proposed, channels
19 carrying control information.

20 Our brief, Your Honor, we provided authority. This
21 issue has been litigated in precisely the same technology space
22 and the construction found there is exactly what defendants
23 have proposed, the finding by the board, by the Patent Trial
24 and Appeal Board that a control channel is a channel that
25 carries control information.

1 Your Honor, I apologize. I need to move forward
2 slides here. I'll just say briefly, NEO's counsel cited the
3 *Embrex* case. We think that's an appropriate case to cite here
4 and what that case said is it referred to terse claim language
5 and that a construction is appropriate where, you know, that
6 construction merely articulates that plain and ordinary meaning
7 and that's exactly what defendants propose to do here.

8 And, frankly, we don't disagree with the preliminary
9 construction. I think what you see in the briefing and what
10 you heard NEO's expert talk about was a primary purpose. That
11 is not embraced in the preliminary construction and to the
12 extent that that is not a part of the Court's interpretation of
13 this term, we agree with that preliminary construction.

14 I think we explained in our briefing and I may have
15 misheard NEO's counsel, but I believe they characterized
16 defendants' position as agreeing with this. I just would like
17 to clarify. That's not the case.

18 NEO's expert provides no basis for this primary
19 purpose naming convention.

20 NEO's expert also does not refer to any extrinsic
21 evidence that would support that convention. What NEO's expert
22 does refer to is a unrelated specification, and defendants
23 showed in our briefing that specification squarely disproves
24 that supposed naming convention. According to Mr. Alberth, a
25 shared channel is used primarily to send data, and a controlled

1 channel is used to send primarily control information. But the
2 specification that they have cited in their brief is pretty
3 clear it contains a data channel. According to Mr. Alberth,
4 that ought to be named a shared channel. It also contains a
5 shared control channel. That supposed naming convention really
6 falls apart in light of that.

7 So, again, to the extent that that primary purpose
8 test is one that the Court has not embraced in its preliminary
9 instruction, we felt it is an appropriate construction.

10 THE COURT: All right. Thank you very much,
11 Mr. Desai. And I don't know if you feel it's appropriate to
12 respond at all, Mr. Stewart, but I'll give you a minute or so.
13 Go ahead.

14 MR. STEWART: Your Honor, the only thing I would say
15 is we're not -- we weren't imposing a primary purpose test,
16 again, and I don't think the Court's construction bears on that
17 at all. It's simply acknowledging, in our opinion, that a
18 person of skill in the art knows what a control panel is. The
19 labels apply to channels and while the communication system
20 throughout the prior art, called themselves control channels
21 and that's what we're talking about in the patent.

22 That's all I have to add.

23 THE COURT: All right. We've been going for about an
24 hour and a half. I think it might be appropriate to take a
25 brief recess here. So it's about 11:27. Let's try and be back

1 in five minutes or so.

2 THE LAW CLERK OF THE COURT: The Court stands in
3 recess for five minutes.

4 (At 11:28 a.m., off the record.)

5 (At 11:35 a.m., back on the record.)

6 THE COURT: All right. Let's get started here. And
7 so Mr. Weissburg, you can call the Court in session.

8 THE LAW CLERK OF THE COURT: Please rise. The United
9 States District Court for the Eastern District of Michigan is
10 back in session. The Honorable Terrence G. Berg presiding.

11 THE COURT: Good morning again, everyone. So we took
12 our break about five minutes ago and we're back on the record
13 here in our claim construction hearing. We just finished the
14 fourth term that was contested here. And now we're going to
15 address the fifth term. This is a term that is also from the
16 '908 patent in Claims One and Two as well as Nine and it's just
17 the term "associated with." So associated with, end quote.

18 So I'm not sure which counsel would like to address
19 that.

20 If you would like to move forward, Mr. Stewart.

21 MR. CASSADY: Your Honor, can I -- this is
22 Mr. Cassady. If I can just have a housekeeping thing real fast
23 with Your Honor, if I could?

24 THE COURT: Go ahead.

25 MR. CASSADY: Your Honor, as was mentioned earlier in

1 the hearing, I've got another hearing tomorrow I need to travel
2 for. I just wanted to ask your permission to leave the hearing
3 when I need to leave. I didn't want to do it without your
4 permission, Your Honor.

5 THE COURT: No, that would be fine. I understand that
6 there are a lot of counsel here in the hearing. So you are
7 certainly excused.

8 MR. CASSADY: Thank you, Your Honor. Thank you.

9 MR. STEWART: Thank you, Your Honor. And this is
10 Chris Stewart again. I will be addressing the next term. If I
11 can briefly -- I understand it will count against my time. If
12 I could jump back to the first term, the low PAPR term, for one
13 brief moment. There was discussion about silence and acquiesce
14 in the other applications where the term was objected on the
15 grounds of indefiniteness.

16 During the break we looked at the record really
17 quickly and I just wanted to put on the record that canceling
18 those claim and amending the claims to remove the low PAPR
19 dispute, NEO expressly said in its remarks in the prosecution
20 that the applicant disagrees with the examiner, but is making
21 these amendments in order to advance prosecution. I just
22 wanted to make sure the record is clear we did explicitly
23 disagree with those and not acquiesce to those.

24 THE COURT: Thank you very much.

25 MR. STEWART: All right. May I proceed on the

1 "associated with"?

2 THE COURT: Go ahead.

3 MR. STEWART: Thank you, Your Honor. Associated with,
4 the dispute here, as you can see on the screen, is whether we
5 clearly and unmistakably narrowed the plain words "associated
6 with" to mean identifying. We agree with Your Honor's
7 preliminary construction that to the extent there was any
8 disclaimer whatsoever, it is simply a disclaimer of the fact
9 that "associated with" cannot merely mean "assigned by".

10 The MAC ID that was identified in *Walton* in the PTAB
11 assigned by the base station, but it was associated with a
12 different entity, the UE, the immobile station not the base
13 station.

14 So if there is going to be any disclaimer, it should
15 definitely be limited to just that. That associated with means
16 more than merely assigned by. It does not, however, need to be
17 further limited to this idea of identifying. And the reason is
18 that, first of all, it's just identifying as narrower and
19 inconsistent with the plain meaning of associated with.

20 Even defendants I think in their brief implicitly
21 acknowledge that associated with is broader, and they have to
22 resort to disclaimer and accuse us of prosecution history
23 disclaimer in order to narrow it to what they want to do, which
24 is identifying.

25 The one reference to it in the specification that

1 defendants point out talks about a code or sequence that is
2 designated to the corresponding base station. That also is
3 less stringent or restrictive than this idea of identifying
4 because the sequence can be designated to that base station.
5 It might not be necessarily uniquely designated to only that
6 base station in a way that would be uniquely identifying of
7 that one against all others.

8 So even the usage in the specification allows for a
9 broader understanding of this term than merely identifying.

10 And then when you look at the statements made in the
11 IPR before the PTAB the defendants only show you in their
12 briefing this one statement where we're talking about the term,
13 "identifying." The user terminal or the MAC ID is used to
14 identify the user terminal and not the base station. But if
15 you look at the brief as a whole or the statements made as a
16 whole, it is just peppered with this primary argument, which
17 is, as you can see in the top left, that the MAC ID is at most
18 associated with the user terminal, not the access point.

19 The MAC ID is associated with the user terminal, not
20 the access point. When *Walton* refers to the user terminal
21 assigned MAC ID, it's referring to a MAC ID associated with the
22 mobile station, not the base station.

23 The point we're getting across over and over and over
24 again, unmistakably was simply that the MAC ID in *Walton* was
25 associated with the wrong element. As evidence of that

1 association, the fact that it was associated with the user
2 terminal, we referenced what *Walton* itself talks about. I
3 think it would be in one of the defendants' slides, they show
4 the portion of the *Walton* reference, where *Walton* talks about
5 the MAC ID being used to identify the user terminal to the base
6 station.

7 So in rebutting, responding to that *Walton* reference,
8 our expert and our IPR counsel talked about identifying as a
9 way of explaining why it's associated with the wrong entity.

10 So, for example, they say it's associated with the
11 base station. We say no, it's associated with the user
12 terminal. See, *Walton* says that the MAC IDs is useful for
13 identifying the user terminal, not the base station.

14 So when you're talking about clear and unequivocal
15 disclaimer, simply using the language of the prior art to
16 explain why that prior art doesn't meet the plain meaning of
17 the claim limitation is not a clear and unequivocal disclaimer
18 or that you're trying to narrow the definition of the words in
19 your patent to match the language that just happens to be used
20 by this one prior art reference.

21 In sum, the fact that we talked about identifying, if
22 at all, was solely just evidence of the way that *Walton*
23 explains the relationship between the MAC ID and the user
24 terminal, which was inconsistent with the claims that require a
25 relationship between the given sequence and the base station.

1 Associated with was still the focus of the argument, it's still
2 got a plain meaning all by itself. It doesn't need any further
3 construction.

4 THE COURT: Thank you very much, sir. Who would like
5 to respond regarding this term?

6 MR. HUGUENIN-LOVE: Good morning, Your Honor, I'm
7 James Hugenin-Love representing GM and I'll respond on behalf
8 of defendants on this term.

9 THE COURT: Go ahead, sir.

10 MR. HUGUENIN-LOVE: May it please the Court, I'll
11 start with Slide 61.

12 (Slideshow displayed and shown throughout presentation.)

13 MR. HUGUENIN-LOVE: This is a slide showing what the
14 key dispute is here and that's whether NEO should be held to
15 its IPR statements that associated with requires identifying.
16 We don't think that the preliminary construction goes far
17 enough because we don't think that it captures the full effect
18 of NEO's IPR statements.

19 And I heard Mr. Stewart comment about there's a
20 primary argument that they had. Yes, they made a primary
21 argument, but then they went further and they said -- made more
22 arguments in order to distinguish why this MAC ID was not
23 associated with the base station. And in order to give full
24 effect to this particular term, I think it's important to look
25 at these other statements.

1 So turning to Slide 62, we can just jump right in to
2 the IPR. I think it's important to focus first on what Dell
3 said in order to understand how narrow NEO interpreted the term
4 "associated with," in order to overcome *Walton*.

5 On the Slide 62, we see the base station and, yes, it
6 assigns this MAC ID. It's a private MAC ID to the user
7 terminal. And so that this user terminal can use the MAC ID to
8 identify itself with this base station and only this base
9 station. And because it identifies itself to this base station
10 and only this base station, not any other base stations, Dell
11 made the argument this MAC ID is therefore associated with the
12 base station.

13 Again, a sequence can be associated with multiple
14 things. It's not limited to an either/or proposition like NEO
15 wants it to be. Particularly Dell cited from, quoted Paragraph
16 122 among other paragraphs, where *Walton* says that this user
17 terminal registers with the access point, the base station, at
18 the start of a communication session and is assigned a unique
19 MAC ID by the access point.

20 And that MAC ID is used to identify the user terminal
21 during the session. So it's clear that this MAC ID, again, is
22 what the user terminal used to identify itself with this
23 particular base station. If it were trying to identify itself
24 to another base station, that other base station wouldn't know
25 who that user terminal is or anything because only one

1 particular base station assigned that MAC address -- or MAC
2 ID.

3 So what did NEO say in response to Dell's arguments?
4 And I think this is the part of the NEO's IPR statements that
5 weren't captured by the preliminary -- by the preliminary
6 construction.

7 So what did NEO say? NEO said, well, *Walton* teaches
8 that the purpose of its MAC ID is to identify the user
9 terminal, not to identify the access point that made the
10 assignment.

11 Therefore, they made the conclusion that the MAC ID is
12 associated with the user terminal rather than the access point.

13 Now, NEO could have ended their argument in the IPR,
14 they could have just said, you know, we don't think that the
15 MAC ID is associated with the base station because it's
16 assigned by the base station, but they didn't. They went
17 further and they used this express word "identify." And this
18 bright-line rule between what's associated and what's not
19 associated with something.

20 Well, it's whether it identifies that something.

21 Mr. Alberth, the expert that NEO used in the IPR and
22 the same expert that they're using in this district court
23 litigation agreed with NEO, and he said, "Knowing the MAC ID
24 does not allow for identification of the access point." He
25 used the same word.

1 And he said, "Therefore, the MAC ID is not associated
2 with the base station," using the same identification language
3 that NEO was arguing. And that was Slide 65.

4 So to NEO's credit, this argument the PTAB found
5 persuasive. In particular, they found this identified language
6 particularly persuasive, and Mr. Alberth's declaration
7 testimony, that a MAC ID is used to identify a user terminal.
8 So, therefore, *Walton's* MAC ID is associated with the user
9 terminal, not *Walton's* access point.

10 So we have NEO's IPR statements, we have NEO's expert,
11 and then we have the PTAB all agreeing and finding persuasive
12 that the argument that the MAC ID is used to identify a user
13 terminal, is what ultimately overcame the *Walton* reference.
14 Because the MAC ID is associated with the user terminal and not
15 with *Walton's* access point or base station.

16 So we think it's important that identify be part of
17 the construction required. Because that makes sure that NEO's
18 held to consistent statements between what was said in the IPR
19 and now what is said in this district court litigation.
20 Because they shouldn't be able to point to a sequence like
21 *Walton's* MAC ID or any other sequence in this litigation that
22 does not identify the base station as satisfying the claim.

23 Now, if I can just jump ahead to Slide 71, which
24 provides a federal circuit case. This is *Technology Property*
25 *versus Huawei* case. We think it's particularly instructive

1 here. In that case the patentee made certain statements that a
2 prior art reference called Madgar (phonetic). The patentee
3 made these statements that Madgar's oscillator is at a fixed,
4 not a variance frequency and relies on an external pistol
5 postulate. And the federal circuit said, you know, maybe the
6 patentee didn't need to make those arguments to overcome
7 Madgar, but they did. And the district court was correct in
8 construing the oscillator term to mean an oscillator whose
9 frequency is not fixed by an external crystal, using the words
10 the patentee used to overcome Madgar.

11 And particularly instructive I think for this case is
12 that the Federal Circuit said that the scope of surrender is
13 not limited to what is absolutely necessary to avoid a prior
14 art reference; the patentees may surrender more than necessary.
15 And when this happens, we hold patentees to the actual
16 arguments made, not arguments that they could have made.

17 So NEO could have limited their argument to what
18 Mr. Stewart said was their primary argument, but they didn't.
19 They went further and they said how to distinguish between what
20 is associated with something and what isn't associated. That's
21 identifying.

22 If it identifies somebody, it's associated with. If
23 it doesn't identify something, it's not associated with. And
24 so we think that our construction, defendants' construction of
25 identifying, captures the full effect that NEO was making in

1 the IPR.

2 THE COURT: Thank you very much, sir.

3 Is there any response to the arguments of
4 Mr. Huguenin-Love's argument?

5 MR. STEWART: Yes, Your Honor. This is Chris Stewart
6 again for NEO with a quick response.

7 That case that was just cited, the *Tech Prop* case from
8 2017, that was before the *Continental Circuits* case from 2019
9 that I cited in my earlier remarks about the exacting standard
10 for disclaimer and the *Continental Circuits* case explicitly
11 talks about the fact that merely criticizing the prior art by
12 reference to a particular embodiment of your invention or
13 comparing and contrasting your invention with the prior art is
14 not sufficient to create a disclaimer unless you make it
15 absolutely clear that you're disavowing all other scope.

16 So that just goes back to what I said in my opening
17 remark. Slide 64 from the defendants said, "*Walton* teaches
18 that the MAC ID identifies the UE and not the base station."
19 They were comparing and contrasting in the context of this
20 specific embodiment of the sequence that was discussed in
21 *Walton*. That doesn't mean that they were giving up all other
22 scope within the term of "associated with" other than
23 identifying.

24 The sequence associated with the base station could be
25 useful for identification. It could be used in that process,

1 but that doesn't mean that it necessarily needs to uniquely
2 identify the base station, which seems to be what defendants
3 are propounding here in order to meet that claim language and
4 there was no disclaimer.

5 THE COURT: Very good. All right. Thank you very
6 much.

7 So let's move on then, to the sixth term and that's
8 also from the same '908 patent, and in that case the term is
9 "both random access signal," and it's found in claims one and
10 two, number four and six and nine. So, I want to give each of
11 you time to address this as well.

12 So Mr. Stewart, are you going to address this or who
13 do we have?

14 MR. BLOMQUIST: Hi, Your Honor, good morning.
15 It's John Blomquist here for NEO. I'll be taking over for
16 Mr. Stewart on this term. My understanding, I've been told by
17 my co-counsel that we are arguing -- in the interest of time,
18 we're arguing this term along with the related dispute over
19 probing signal in the PR 2 patent.

20 THE COURT: All right. So you're going to address
21 random access signal from the '450 patent and then also the
22 probing signal from the '302 patent?

23 MR. BLOMQUIST: That's right, Your Honor.

24 THE COURT: Go ahead. How many minutes do you think
25 you need?

1 MR. BLOMQUIST: Hopefully 10 minutes, Your Honor, but
2 we do want to spend some time on this term for sure.

3 THE COURT: Go ahead.

4 MR. BLOMQUIST: Thank you, Your Honor. Again, this is
5 John Blomquist for NEO Wireless, and the dispute for this term
6 and both terms in question here is really about the role of the
7 specification in construing random access signal and probing
8 signal. But it's vitally important to begin with what is
9 undisputed in both of these cases, which is that -- oh, excuse
10 me. I'm not sharing my screen.

11 There we go. Can you see, Your Honor?

12 THE COURT: I just see a black screen at this point.

13 (Pause in proceedings.)

14 (Slideshow displayed and shown throughout presentation.)

15 MR. BLOMQUIST: Okay. Thank you, Your Honor. Again,
16 the dispute about this term is really about the use of the
17 specification. But what's undisputed for both random access
18 signal and probing signal is that those terms, those terms in
19 question, convey general concepts that were well-understood at
20 the time of the invention. Again, using a signal for random
21 access or for channel probing, those are things that were
22 understood. The procedures were understood in wireless
23 communications and that's given with unrebutted expert
24 testimony in this case.

25 Again, Mr. Alberth is saying that both -- there's a

1 similar excerpt in his declaration for permanent signal because
2 it's true for both that they were extremely well-known terms in
3 the art at the time of the patent.

4 So, of course, the claimed elements in addition to
5 these specific terms in both patents that add, you know, a
6 novelty for a claimed invention. But the specific term in
7 question here, "simply random access signal", has on its face a
8 well understood, unambiguous meaning in the art. Once again,
9 this is not part of the dispute. Not only is it unrebutted
10 again on the factual record here, but it's undisputed in terms
11 of attorney argument.

12 Defendants have used the term -- even today we saw a slide
13 for a different term, talking about random access signals
14 generally. Again, to convey a general concept of a random
15 access signal, the random access procedure, and again, the
16 equivalent for channel probing.

17 And that's vitally important for this analysis because
18 the recent cases especially from the Federal Circuit all really
19 turn on using the specification for this sort or decisive or
20 definition of the language. When the term is somehow uncertain
21 or ambiguous in its plain and ordinary meaning, basically, when
22 a POSITA would come to the claim term, would it be that they
23 have uncertain or unclear understanding of what that term means
24 in the art.

25 And that's simply not true here. And in the first two

1 cases, the cases cited by the defendants in briefing. Again,
2 the term in question has no plain and ordinary meaning,
3 therefore, we turn to the intrinsic record of the patent. The
4 second case, the wireless hardly has a claim on there, meaning
5 therefore the specification language has the sort of decisive
6 significance.

7 And again, this World Class is just *World Class Tech*
8 *Corp.*, 769 F. 3rd, 1120. It's just again another recent case.
9 Again, the claim language when it leaves uncertainty, in those
10 circumstances the terms and specifications resolve the
11 uncertainties.

12 Again, that's just not the case here.

13 Both random access signal and probing signal as
14 general concepts are understood in the art. In fact, there's
15 not even evidence in the record that they have an understood or
16 useful meaning outside of this art of wireless communication.
17 These are terms that again convey specific concepts in the art.

18 So turning back now, with that understanding, the
19 dispute is whether the specification requires limiting or
20 excluding the scope of these well-understood terms, and, again,
21 this must be done through this claim.

22 And defendants make two primary arguments in support
23 that there has been this claim that we must narrow the terms
24 beyond, again, their well-understood meaning.

25 And the first is that it's a form of the argument that

1 the disclosure does not describe or use other signals for
2 random access or for channel probing. But this splits the
3 entire disclaimer analysis on its head.

4 The appropriate analysis is not whether the term that
5 has a well-understood scope can include what -- again, what is
6 otherwise a plain and ordinary meaning. It's not whether a
7 term can include it. It's not the supposed absence of
8 disclosure that causes disclaimer. That is all -- again, as
9 has been already foreshadowed, maybe potential written
10 description arguments supposedly from the other side. But for
11 disclaimer in claim construction, it is an affirmative express
12 manifestation of intent that deliberately limits the scope of
13 the claims.

14 Again, if you otherwise have a plain and ordinary
15 meaning, you need those express statements in order to
16 disclaim.

17 So we turn to the defendant's second argument, which
18 is -- this is part of the '908 patent. The '908 patent -- oh,
19 I'm sorry, Your Honor. No, please.

20 THE COURT: Random access signal I guess, if you look
21 at -- it's probably undisputable. You're using it in a
22 specific way I think in light of the context of these claims.
23 Because they're being used at the access signal.

24 MR. BLOMQUIST: Your Honor, when we talk about context
25 of the claims of the specification, we need to keep in mind,

1 again, some clear federal circuit law about even if you
2 describe only one embodiment or if a limitation is shared
3 amongst all of the embodiment, right. That meaning of the
4 disclosure only in both of those scenarios describes things
5 with a certain limitation, for example, or provide the context
6 for a certain limitation, that doesn't mean it's proper to
7 import the limitation into the claims. But it's specifically
8 not used. And, again, that is especially true when otherwise
9 the term "random access signal" or "probing signal" has a
10 well-understood meaning.

11 So again, that is something that is -- I think it's on
12 the next slide here.

13 Yeah.

14 But again, it is simply when we talk about context, to
15 us that's almost a misnomer because really in order to alter
16 the scope of these terms, there needs to be a disclaimer.
17 Because you can't just, again, look at the embodiments or look
18 at the entire description and say, well, it's only described
19 this much; therefore, you are strictly limited to what's
20 described amongst the embodiments.

21 But they don't redefine the words. Again, that is
22 something that is clear Federal Circuit law.

23 And again, we point to -- in the middle here, I
24 present another recent case, *Canedness Pharmaceutical*. Just
25 again reiterating this point of law in the recent cases even if

1 all of the embodiments included a specific limitation, it would
2 not be proper to import those limitations.

3 And going to some of the statements that are in the
4 patent, which, again, were on the previous slide, Slide 21,
5 this is what defendants point to as the statements, the
6 affirmative statements that supposedly act as clear disclaimer,
7 and they do not.

8 Especially when looking at, for example, a case like
9 *Continental Circuits* where, again, just descriptions of the
10 present invention, they dealt with similar statements there, do
11 not cause clear disclaimer on their own. And also from that
12 case, the teaching about the purpose of the specification to
13 fully describe in detail a particular mode of the invention and
14 particular embodiments of the invention, does not mean, you
15 know, fulfilling that purpose, in the Section 112, for example,
16 does not mean that you are, therefore, limited to just that
17 mode. And again that is clear for that case as well.

18 But that analysis, Your Honor, is all just looking at
19 those statements from column two of the patents in a vacuum.
20 You must, of course, review the specification as a whole, and
21 that's what a POSITA would do when figuring out whether or not
22 there was a clear and deliberate intent to the inventors to
23 limit the scope of these otherwise well-understood terms.

24 And here are the examples from the patent of contrary
25 statements of those intentions. You know, the detailed

1 description of the embodiments is not intended to limit concise
2 disclosure. "The teaching of the inventions herein can be
3 applied to other systems, not necessarily the systems described
4 above. The actual scope of the invention encompasses not only
5 the disclosing embodiment."

6 So this is not even a case where there is
7 specification language where it's solely uncontradicted that
8 the patentees or inventors intended to limit the scope of their
9 invention and the specification. There is, in fact,
10 contradicting statements about that and, therefore, makes it so
11 it's not clear and unmistakable.

12 And so on top of that, Your Honor, you know, talking
13 about the fact that these terms have a well-understood meaning
14 in the art and, therefore, already hesitate to override that
15 meaning with context, for example, in the specification, we
16 have another piece of intrinsic evidence, which for the random
17 access signal term in particular is the claim eight of the '908
18 patent.

19 Again, we believe that this argument, our position is
20 correct, notwithstanding this, but this creates the strong
21 presumption confirming our position.

22 And the cases cited by defendants in briefing to
23 dispose of the claimed differentiation point, again, which
24 creates a strong presumption of a correct construction, is
25 simply not apt here. They have not provided a case where its

1 disclaimer and that claim differentiation does not overcome
2 that. And especially in this case, where they're not. They're
3 arguing, for instance, that it's just context from the
4 specification that should be imported.

5 THE COURT: Can I just ask you, if you -- as this
6 paragraph eight said, it's citing here: "A random access
7 signal is a spread spectrum signal," why would you object to
8 random access signal -- (indiscernible.)

9 MR. STEWART: I apologize. Can you repeat the
10 question, Your Honor? I think I missed the last part of your
11 question.

12 THE COURT: I said the slide that you have up right
13 now says that the random access signal is an spread spectrum
14 signal." So why would you object to the construction of random
15 access signal that does just that, when it says the same thing
16 that this slide says?

17 Mr. BLOMQUIST: Well, there are two points there, Your
18 Honor. So, first this is claim eight, the dependent claim of
19 claim one. So the presumption that is from the existence of
20 this claim, in order to not read as superfluous, would be that
21 the random access signal that's being modified by this language
22 in Claim Eight is presumptively broader. So that the random
23 access signal includes in it, scope that is not just a spread
24 spectrum signal. And on top of that, Your Honor, to be clear,
25 we wouldn't even agree necessarily that this is adopting a

1 direct sequence spread spectrum signal. This is just a spread
2 spectrum signal, which, again, might be different in scope,
3 presumable broader in scope than even a direct sequence signal.

4 So that's, again, why we believe -- we oppose the
5 construction of the intentionally broader Claim One, the
6 independent claim on which this depends.

7 And so with that, Your Honor, I believe that's all the
8 argument I have for these terms and we appreciate your time
9 today.

10 THE COURT: Very good. Thank you very much, sir. So
11 let's see, from our defendants, who would like to respond?

12 MR. CORDELL: Good morning, Your Honor. I think it's
13 still morning, Ruffin Cordell from Fisher Richardson on behalf
14 of Honda. And I'll be presenting. Let me see if I can share
15 my screen.

16 (Slideshow displayed and shown throughout presentation.)

17 MR. CORDELL: Can you see that okay, Your Honor?

18 THE COURT: Yes. Thank you.

19 MR. CORDELL: Yes. I'm here to respond to the RAS or
20 random access signal terms, and what I've got up on Slide 76 is
21 I took a little liberty, Your Honor, and I put Your Honor's
22 proposed construction or preliminary construction in the slide
23 rather than what we had had because, frankly, we like it
24 better. You took what we had put in, which was kind of a
25 incomplete thought and you've completed it. And, you know, I

1 often say that in these Marksman proceedings we are here in the
2 first jury charge conference of the case. The whole reason why
3 the Supreme Court and Federal Circuit tell us to do these
4 Marksman hearings is to translate these esoteric technical
5 concepts and use something that's accessible to the jury.

6 And I have to admit the Court's preliminary
7 construction is better than mine. So I admit it right up
8 front.

9 And, you know, when we look at the -- when we look at
10 the intrinsic record in this case, Your Honor, we think this is
11 pretty compelling.

12 So we begin with the notion that the specification is
13 just absolutely overwhelmingly in favor of the preliminary
14 construction; that it shows us time and time and time again
15 that the fundamental concept of the '908 and '302 patents is
16 this idea of overlaying these multi-channel signals with a DSSS
17 or D triple S signal. The patent tells us that this is, you
18 know, it tells us right at the outset of the specification that
19 that's, in fact, where this invention lives. And they do it
20 not just in passing; it's not just an accident that they
21 embrace the overlap between multi-channels or MC signals and
22 the D triple S techniques. And it's done for very good reason,
23 for reasons that the patent tells us are critical, critical to
24 the performance of the invention.

25 So on 581, what I've got is an excerpt. It is indeed

1 from Column Two as counsel suggested I might because he knows
2 that these patents are directed to the notion that you're going
3 to use this DSSS technology because it's uniquely situated to
4 be used alongside the open channel approach. And the idea is
5 that you can use this DSSS that has, you know, great properties
6 in this particular context, such as simplicity,
7 self-synchronization and performance under severe interference,
8 which is exactly what happens in an initial random access. And
9 the patent tells us that right at Column two, lines 49 through
10 53.

11 And it's this notion that you're going to take advantage
12 of both different approaches to mitigate the weaknesses that
13 the patent is really focused on.

14 Critically here, Your Honor, this isn't a case where
15 the specification tells us that this is an option. You might
16 be able to do it this way; you might be able to use D triple S.
17 What we have is a specification that stresses the importance of
18 DSSS, the criticality to the overall function of the system and
19 then tells us the embodiments -- those are the magic words.
20 The embodiments, plural, of this invention, use the combination
21 of MC and DSSS signals.

22 What the law tells is when the patentee chooses to use
23 that term, a clear statement of specification, that the
24 invention or the embodiments of this invention, or the present
25 invention, all those are magic words that patent lawyers then

1 say, okay, you're telling the whole world, you're telling the
2 public that your invention is directed to this concept, and
3 that has a couple of impacts. Number one, it means you have
4 ownership of that concept and you have ownership of using DSSS
5 in a random access signal context. But it also says that
6 that's what we own. They are setting the boundaries of what
7 they actually own. And in the *Microsoft* case that we cite,
8 makes it clear that when the patentee chooses to do that, we
9 didn't write this patent; we didn't tell them to do it.

10 When they choose to do it, they have to be held to
11 their word. They have to be true to their word, and the patent
12 has to cover what they told the whole world it would cover.

13 The other magic words are all the embodiments. We
14 just saw that as a specification, all embodiments plural of the
15 present invention are broad and unequivocal.

16 And, again, they choose those words. They choose to
17 come into the patent office with that specification and they
18 have to be held to it.

19 The other thing that struck me, and I'm stepping
20 forward a little bit, Your Honor, to '588 is the ubiquitous
21 nature of their reliance on DSSS.

22 I counted, there were over 125 references to DSSS.
23 But importantly, there were no references to any other modality
24 for carrying out a random access signal.

25 You know, I have not convinced the Federal Circuit to

1 write a case that talks about the ubiquitous claim construction
2 canon just yet, but it should be there, because of ordinary
3 skill in the art leading this specification is confronted with
4 the fact that DSSS is used over and over and over again. And
5 again, they have to be true to their word.

6 The *Wireless Protocol Innovations* case tells us that
7 repetition, in fact, does have an impact on claim construction.
8 That, you know, taken with the uniformity of the specification,
9 then maybe I do have my ubiquitous canon of claim construction
10 after all. You can't go into the patent office, tell them that
11 your patent is directed toward providing a random access signal
12 using a DSSS signal, and then walk it back when it comes time
13 for litigation. That's just not the way the system works.

14 We did have a bit of prosecution history on this term.
15 There was a little back and forth between the patentee and the
16 patent examiner. And as Your Honor knows, this is often very
17 illustrative and we will see the true intentions of the
18 patentee and the true understanding of the patent examiner as
19 we look at their correspondence. A little bit like a draft
20 history in a contract negotiation. You know, those red lines
21 tell us a lot -- what arguments did they make; what did they
22 say about it?

23 It's -- I guess you would call it parole in a contract
24 dispute, but here it's intrinsic. It's part of the actual
25 record.

1 And we know that they were debating. The examiner
2 said, "You know, I don't know what you mean by this disclosure
3 of the initial random access signal by some time duration and
4 the guard period length."

5 He was unclear that -- whether the disclosure itself
6 actually told him what that was. So the applicant responded.
7 And here they said, this feature, the random access signal
8 feature, this feature is illustrated at least in Figure Five
9 and then described in Paragraphs 34, 35 and 63.

10 Well, let me show you those, Your Honor. This
11 feature, it turns out is in Figure Five.

12 And I apologize because I know this is somewhat hard
13 to read. But you'll see that there is an OFDM signal. This is
14 the multi-channel signal shown as Elements 512. And then
15 there's a spread spectrum signal, Number K. And they're
16 pointing to this spread spectrum signal, Number K, as being the
17 random access signal.

18 And then when we would go to the paragraphs that they
19 cited, we see, in fact, that these are DSSS signals. So in the
20 middle of Paragraph 35, it says that are synchronized, for
21 example, DSSS signal Number K in Figure Five.

22 So, again, over and over and over again, the patentee
23 chose to point to these DSSS signals as the random access
24 signal.

25 NEO, I heard an argument suggesting that perhaps this

1 is just one embodiment, but that is just not true, Your Honor.
2 You can study it in every single embodiment of this invention,
3 this specification, the patentee pointed to DSSS signals and
4 nothing else.

5 You know, we had a little bit of discussion about
6 whether the specification involves -- it can somehow be
7 imported into the claims, and that's not what we're doing here.

8 What we're doing is we're holding the patentee to its
9 word. What the Federal Circuit told us in *Phillips* is the
10 specification is often the single best tool that we are to use
11 to interpret the patent claims.

12 And that's exactly what we're doing. There's no
13 importation here. And if I can -- let me just jump ahead a
14 little bit and talk about claim differentiation. Counsel
15 pointed you to Claim Eight and said, well, in Claim Eight, they
16 talked specifically about DSSS signals or at least DSS signals,
17 I guess, it wasn't direct. But the fact of the matter is, Your
18 Honor, claim differentiation is one that we have to be really
19 careful about using. The Federal Circuit has called it a weak
20 canon of claim construction, if a canon at all. Because we, as
21 patent lawyers, are trained to vary our claim patterns, to add
22 details sometimes recursively and so you have to be really
23 careful about trying to use claim differentiation as a primary
24 basis to construe the claims.

25 If I can be heard for just a moment on counsel's

1 argument with respect to disclaimer, we see this in all these
2 cases, that the patentee will come in and say, no, no, no, you
3 can't look at the specifications, you can't look at the
4 prosecution history unless you get to the level of a
5 disclaimer, but that's a little bit of an overstatement -- it's
6 a lot of an overstatement. What disclaimer law tells us is if
7 my claim says four-legged mammal and everybody understands what
8 a four-legged mammal is. It's precise, it's -- everybody knows
9 what a four-legged mammal is. And in your specification or
10 your prosecution history, you says it doesn't count for horses.
11 The horses will not be covered by this patent. That's a
12 disclaimer and that can be used to limit the claims.

13 That's not what we're doing in this case. In this
14 case we are using the specification and the unanimity, the
15 ubiquitousness of the reliance on DSS to properly frame RAS for
16 this jury. That's entirely appropriate and the straw man of
17 suggesting that we have to reach a disclaimer is exactly it,
18 it's a straw man. It's a bridge you don't need to reach
19 because it's just not appropriate here.

20 So with that we believe the Court's proposed
21 construction is exactly correct, and we think that the
22 construction should be a direct sequence spread, spectrum
23 signal -- excuse me. Used as a random access signal.

24 And then, Your Honor, we had talked about maybe
25 covering the '302 claim as well here. And if I can jump ahead

1 to Slide 132. This is the probing signal element. And the
2 arguments are pretty much the same. I can take you back
3 through the slides and you'll see over and over again that the
4 probing signal is also equated with a DSSS signal. If I can go
5 to, for example Slide 137. It talks about using DSSS for
6 channel probing in Column Two, lines 44 through 50 again.
7 Again, they stress the signal properties of simplicity or
8 self-synchronization performance but what I would like to do,
9 if I could, Your Honor, is to race ahead a little bit to the
10 slides that are sort of unique for this element which -- I
11 can't quite type this morning

12 There we go. And that's the prosecution history on
13 probing signal is a little bit different. So in the
14 specification the inventor tells us that channel probing uses
15 DSSS. They're quite candid. It's very straightforward, and
16 they claim one of the advantages of using DSSS as a probing
17 signal and that's at Column Nine, lines 31 through 35 from
18 Slide 147.

19 But then in the prosecution's history itself at Slide
20 148, the applicant itself equated DSSS with probing signal, and
21 they did it in a signal phrase. Specification describes
22 various schemes that may be used to minimize interference
23 between the DSSS, paren, probing, paren signal and the MC or
24 multi-carrier signals.

25 So they made their case very clear here, and this is

1 not a situation we're trying to interpret something that was a
2 thinly veiled reference or an accidental, you know, slip of the
3 draftsman. They've done it consistently; they've done it
4 repetitively; they've done it in the specification; they've
5 done it in the prosecution history and in having told the world
6 that that's what their patent is all about, they need to be
7 held to it.

8 So, with that, we think the Court's preliminary
9 construction is correct, and I'll pass the podium unless Your
10 Honor has any questions.

11 THE COURT: I thank you very much. Is there any
12 response?

13 MR. BLOMQUIST: A couple brief points, Your Honor.
14 We've heard, I think, a few times the phrase from opposing
15 counsel about telling the world what your invention is. And,
16 of course, basic claim construction law discuss the claims.
17 The claims provide the notice, the claims provide the metes and
18 the bounds. And that's why the analysis starts with the
19 claims.

20 Interestingly, the analogy about altering, you have a
21 well-understood term is apt here that opposing counsel gave.
22 We have a four-legged horse. A random access signal is very
23 similar in that regard and, in fact, the unrebutted testimony
24 here is similar and to exclude something from the scope of that
25 well-understood term, you do need that express disclaimer of,

1 but not horses. Right? That's exactly what we're talking
2 about here.

3 As far as turning to the specification, this
4 ubiquitousness argument has been squarely rejected. That's
5 what *Thorner* has talked about in the cases like it. You know,
6 talking about again, even if all the embodiments discussed in
7 the patent including specific limitation, it's not proper to
8 import it. Again, you can use it throughout your description,
9 throughout your description of the specific mode that you're
10 talking about, and that does not mean whether it's ubiquitous
11 or otherwise that you limit the claim scope of a term that has
12 an ordinary meaning.

13 And the term -- again, the affirmative statements of
14 disclaimer of the patent talking about the embodiments, you
15 know, confidential -- on similar statements, and again those do
16 not rise to the level of disclaimer.

17 THE COURT: Thank you. Thank you very much. I think
18 we can move on then to the next term and in this case, we are
19 talking about the seventh one here, and that's the time
20 frequency resource --

21 THE COURT REPORTER: Judge, I apologize. I'm having a
22 hard time understanding you on this one. This is the court
23 reporter.

24 THE COURT: I'll speak up nice and loud here. So we
25 are talking about the sixth one here -- I'm sorry, the seventh

1 one and that's the time frequency resource unit. So let's hear
2 some argument on that one. That's from Patent '450, claims
3 seven and eleven. So who would like to address that for
4 plaintiff?

5 MR. HAMAD: Good afternoon, Your Honor. This is Hamad
6 M. Hamad for NEO on the time frequency of the first unit.

7 THE COURT: How much time would you like, sir?

8 MR. HAMAD: I think about five minutes, Your Honor.

9 THE COURT: Go ahead.

10 MR. HAMAD: Thank you. So on this term, Your Honor,
11 the first thing I just wanted to start off by pointing out is
12 that the heart of the defendants' proposal here is disclaimer.
13 Just for purposes of the record, I wanted to point out that as,
14 we relay on our briefing, we don't think that they have met the
15 disclaimer standard here, *Continental and Thorner*, we've heard
16 a lot about them today. In particular, they explain that
17 contrasting and comparing the prior art in the context of an
18 embodiment of an invention is not enough for disclaimer,
19 criticizing the art is not. And then even having only one
20 embodiment described throughout the specification would not be
21 enough for a disclaimer.

22 I'm going to actually jump to the Court's proposal
23 here.

24 I'm sorry. Let me share on the screen.

25 (Slideshow displayed and shown throughout presentation.)

1 MR. HAMAD: And this is, I guess, where I would like
2 to spend some time. The Court's preliminary construction, from
3 our view, still does a little bit of the disclaimer and
4 importation of some of those statements from the IPR. We do
5 think the Court's preliminary construction rejects most of the
6 most problematic issues from the defendants' proposal and, you
7 know, more closely aligns with how we think the law and the
8 statements from the IPR should fall out.

9 One thing I wanted to display here is when you put the
10 Court's preliminary construction into the claim language, you
11 end up getting this repetition or this redundancy of the
12 mention of the number of symbols and subcarriers. So the plain
13 language itself already gives elaboration on what a time
14 frequently resource unit and it's this bolded, italicized
15 portion, where the claim says that each unit containing a set
16 of frequency subcarriers in a group of OFDM symbols, where
17 N equals 248. And so with the Court's construction we would
18 have a mention of symbols and subcarriers of twice and we think
19 there's some potential confusion that could be introduced
20 there.

21 So, you know, while our primary position is still that
22 there should be no disclaimer for this term, and that it should
23 just accord its plain and ordinary meaning as even Volkswagen
24 in its IPR stated or took that position, if the Court was
25 inclined to nonetheless construe it using its preliminary

1 construction, we would propose a modification for clarity here.

2 If we take the Court's regularly shaped phrase and we
3 include it into the term -- or for the term, time frequently
4 resource units, leaving an undisturbed the each unit containing
5 a product frequently subcarriers in a group of OFDM symbols,
6 leaving that phrase undisturbed so we don't get a reputation of
7 symbols and subcarriers where there's potentially some
8 confusion. And that's all I have on this term, Your Honor.
9 Unless you have any questions, thank you.

10 THE COURT: Very good. Thank you very much. So who
11 would like to respond on behalf of the defendants?

12 MR. ERICKSON: Your Honor, Brian Erickson with DLA
13 Piper representing the Toyota defendants. I'll respond here.

14 THE COURT: You can have five minutes, sir.

15 MR. ERICKSON: Slide 101, Your Honor, the key dispute
16 is whether NEO's wireless disclaimer in the IPR was clear. In
17 fact, it's the only legally relevant dispute before the Court
18 and it's dispositive of the construction of this term.

19 Going to Slide 102, what we have here on the left is
20 the penultimate paragraph used by NEO Wireless to clear this
21 patent of Dell's IPR. I say it's the penultimate paragraph,
22 Your Honor, because there are approximately eight pages worth
23 of argument that NEO Wireless made building up to this
24 paragraph, all about the specification, comparing it to the
25 prior art, and talking about embodiments, but NEO wireless knew

1 that wasn't enough. NEO Wireless knew that the board at the
2 patent office doesn't care whether you distinguish the prior
3 art in the embodiment. That won't cut it.

4 They had to distinguish the prior art from the claims,
5 and to do that, they got to this paragraph. This is the
6 conclusion. This is the penultimate paragraph. After this
7 paragraph, they begin using this disclaimer to distinguish
8 prior art.

9 So let me parse this paragraph briefly, Your Honor.
10 The first sentence you see starts "The inventions." One
11 diminishable basic resource unit or quote, time frequency
12 resource unit, close quote, as recited in the independent
13 claims.

14 Let me stop there, Your Honor. That is a remarkable
15 introductory phrase when it comes to patent law. This is a
16 patent that is -- at the time was in co-pending litigation with
17 Dell. This is an IPR, the lawyers and NEO Wireless knew
18 anything they said could and would be used against them and to
19 start this paragraph that way is the reddest of red flags. And
20 that leads us right into the disclaimer itself. So after
21 clarifying and talking about invention and the quoted claim
22 term as used in the independent claim, they state, quote: "A
23 time frequency resource unit is not an arbitrary combination of
24 time and frequency units and is, instead, designed according to
25 the application requirements of the application that is being

1 grouped."

2 Now, NEO Wireless started there in the negative, and
3 let me start with that first phrase, Your Honor. If you take
4 time frequency resource unit out of the intrinsic record, if
5 you take it out of the patent, ignore the specification, ignore
6 the file history, and you just look at the words "time
7 frequency resource unit," it is an arbitrary combination of
8 time and frequency units. Right? It can be three time units
9 and three frequency units, or maybe five of each. It's
10 arbitrary. Any combination of those could be used as a unit.

11 So what we have here is a clear and unmistakable
12 disclaimer of the ordinary meaning. So NEO Wireless's proposed
13 construction has been disclaimed. And that creates a massive
14 void, Your Honor. When one of ordinary skill is reading this
15 and sees the patent owners say, "I don't want the ordinary
16 meaning. This as used in the claim is not the ordinary
17 meaning," there's a massive void there and something must fill
18 that vacuum. So once they've erased the ordinary meaning and
19 writing on a blank slate, they define precisely what they mean
20 in the claim for this term. They say it is instead designed
21 according to the applicational requirements of the application
22 that is being grouped.

23 You see defendants' proposed construction on the right
24 here? Faithfully and verbatim takes that language as the
25 proposed constructions.

1 So the IPR here, this statement, is clear, it's
2 unmistakable, and, in fact, Your Honor, it's really -- were
3 uniquely postures here where it comes to this type of claim
4 construction dispute, because NEO Wireless never addressed this
5 language. We brought it up for briefing in our meet and
6 confers and we told NEO Wireless, we're using your language,
7 we're quoting your language. Tell us why it's not clear. Tell
8 us what the possible mistake would be. And Neo Wireless choose
9 not to address it in its opening brief. That was frustrating.
10 We thought they were sandbagging us in bringing it up in their
11 reply, but then they didn't address it in the reply. This is
12 like having a clear contractual term and one party says the
13 clear contractual term supports us and the other party doesn't
14 address the contract. They just address parole evidence or
15 something. There is really no genuine dispute in material fact
16 that this statement is clear and unmistakable. There's no
17 ambiguity here. NEO Wireless and its expert don't come back
18 and say this is confusing.

19 Here's where something, a person of ordinary skill
20 might think I don't know what you mean here. This is
21 ambiguous. This isn't clear. We can mistake it for something
22 else. There's simply no clash on this issue, Your Honor. This
23 is legally dispositive. This is a clear and unmistakable
24 disclaim of claim scope. It's not the ordinary meaning. It's
25 the meaning they assigned it here.

1 What NEO does argue, NEO Wireless spent in most of its
2 brief, it spends time discussing what it alleges are other
3 disclosed embodiments. Now it factually incorrect, Your Honor.
4 And I don't have time to go into why it's factually incorrect
5 but legally -- what's important is that legally it's
6 irrelevant.

7 It doesn't matter how many other embodiments you
8 might have disclosed. Let's assume that one embodiment grouped
9 applications and designed the units according to the
10 application requirements of the application that is being
11 grouped. Let's assume that's only one embodiment and let's
12 assume there are 12 other disclosed embodiments that do it
13 differently. It doesn't matter, right? This is a disclaimer.
14 They said not the ordinary meaning, maybe we could have claimed
15 more, maybe we could have made a different disclaimer, maybe we
16 could have said designed according to common parameters or
17 something broader. Maybe they could have done that, but they
18 didn't. This is the disclaimer they made and this is the
19 disclaimer they used to free this fact from the IPR. The
20 public, including the defendants, are entitled to rely on it.

21 Briefly, Your Honor, the Court's preliminary
22 construction doesn't go far enough. This is a disclaimer. It
23 is all or nothing. The Court's preliminary construction of a
24 regularly-shaped unit having a fixed number of symbols and
25 subcarriers, it does not accurately reflect this disclaimer.

1 In other words, you could have a regularly-shaped unit with a
2 fixed number of symbols and subcarriers, again, maybe three of
3 each, right? That would be regular. It would never change.
4 Every application and every communication would always have to
5 use it, no matter how inefficient it was. So it would be
6 regular, it would be fixed, but it would still be arbitrary.
7 There's just a number that had been picked. It's arbitrary
8 with respect to the application being briefed. So it does not
9 accurately reflect this disclaimer.

10 Additionally, jumping forward a few slides. The
11 Court's preliminary construction would exclude all disclosed
12 embodiments.

13 I'm sorry, Your Honor.

14 THE COURT: I'm saying we're getting close to the end
15 of your argument.

16 MR. ERICKSON: Yes, Your Honor. In the only disclosed
17 embodiment it uses one size unit, it designs one type of unit
18 for voice applications and it uses a different unit for video
19 applications. This is the only disclosed embodiment that is
20 discussed at length by patent owner in the IPR as well. So
21 they're not regular and they're not fixed. They're irregular
22 as you go along and they change as you go along, as you go into
23 different application groups.

24 Looking back to the actual disclaimer, Your Honor, there
25 is this -- in sentences three and four in this penultimate

1 paragraph. It does talk about regularly shaped units, but it's
2 regular in the context that it's regular for the application.
3 If you look at each of these phrases, if you see my cursor, it
4 states regularly shaped time frequency resource units allocated
5 at the application granularity level. So they change. They're
6 irregular when you switch to a different application, but
7 they're regular for that application. And then the same thing
8 with the final sentence, the regularity of the time frequency
9 resource unit only became unlocked due to the similar resource
10 requirements has been used of the same application.

11 So in sum, Your Honor, there's really no dispute
12 before the Court. There's no argument by NEO Wireless that
13 this is somehow a confusing or might be mistaken for something
14 else. This is a clear and unmistakable disclaimer, and that's
15 it. The fact that the patent could have said something is
16 irrelevant.

17 That's all, Your Honor, unless you have any questions.

18 THE COURT: Thank you, Mr. Erickson.

19 So would you like a brief response?

20 MR. HAMAD: This is Hamad Hamad for NEO. So the first
21 thing that I want to address is this notion that in our briefs
22 we didn't respond to defendants' arguments about the alleged
23 IPR disclaimer according to our opening brief Document 127 at
24 pages 23 to 24, where we directly address this. In our reply
25 brief, document 133 at nine, where we cite Mr. Alberth's

1 declaration, Paragraph 41, where he also addresses this. So
2 I'm not sure where that comes from.

3 I want to -- let me share my screen very briefly.

4 (Document displayed.)

5 MR. HAMAD: This is Mr. Alberth's declaration on this
6 point that I wanted to make. The point that I -- I'm sorry,
7 Your Honor.

8 Our argument in the brief was that IPR references did
9 not suggest one dimensional time frequency. These are excerpts
10 that defendants rely on -- I'm sorry. These are excerpts from
11 the pauper that the defendants rely on. And Figure six in
12 particular that was used in this discussion is an embodiment
13 that relates to WiMax. It uses WiMax in the invention. And
14 that was the most relevant embodiment to respond to Dell's IPR
15 that asserted WiMax itself had an exemplary embodiment. So
16 this walks into the *Continental* case, saying if you are
17 contracting and comparing prior art with respect to an
18 embodiment, that is not going to be a disclaimer for all
19 aspects or all scopes, or all embodiments of the invention.

20 The last point I wanted to mention, counsel said that
21 the Court's preliminary construction would exclude the
22 embodiment from the invention. And I think the focus there was
23 on actually Figure Six, but the Court's preliminary
24 construction is not that a zone is regularly shaped, but rather
25 a unit, a resource unit is regularly shaped. And I would point

1 the Court to Figure Nine, which was actually something that was
2 cited in defendants' identification of intrinsic evidence when
3 we were doing exchanges and Figure Nine describes application
4 zones and then says, "The zones that are not used by
5 applications," which is another reason to not limit it to just
6 application-based grouping. You have these zones called
7 Special Resource Zone and Figure Nine explains special resource
8 zones may be irregularly shaped. But then goes on to describe
9 that they have subdivisions of predefined, kind of equal in
10 size, equal in shape resource units.

11 So I don't think the Court's preliminary construction
12 would want to follow that. We would just propose, as I
13 mentioned, this modification for clarification and not to have
14 a duplication or redundancy of those terms, symbols and
15 subcarriers.

16 Thank you, Your Honor.

17 THE COURT: Thank you.

18 So that will complete our argument regarding the
19 seventh term.

20 So let's move on to the eighth term and that term is
21 from the '941 patent, and the Claims 8 and 13. And that phrase
22 says, "The antenna transmission scheme comprising as
23 transmission diversity scheme or a multiple input, multi-output
24 (MIMO) scheme."

25 That's the phrase that we're talking about there.

1 And who would like to address this?

2 MR. STEWART: Your Honor, that will be me, Chris
3 Stewart, on behalf of NEO Wireless.

4 THE COURT: How many minutes would you like?

5 MR. STEWART: Five.

6 THE COURT: Go ahead.

7 MR. STEWART: So for this term and there's a similar
8 dispute with the next term, which is related to corresponding
9 subchannel configuration. I think the dispute here really
10 arose from the long -- the history of having a prior litigation
11 where there was negotiation with Dell in a previous case that
12 led to an agreed construction. That's obviously sort of an
13 unwieldy process and the difficulties inherent in language and
14 trying to be precise in these sort of things, led to what is
15 the dispute before you today, whether the words "alternatively
16 indicate" that we included in the agreed Dell construction
17 means something different than what we intended them to mean.

18 I think at the bottom, your preliminary construction
19 does a better job than we did in the agreed construction with
20 Dell. The point here is simply that the intended transmission
21 scheme can indicate it's capable of comprising either a MIMO
22 scheme or a transmission diversity scheme, but not at the same
23 time.

24 The progression of the Dell negotiations, which is
25 evident in the defendants' exhibits, which are email exchanges

1 with Dell, show that our concern was, okay, we agree it has to
2 support both schemes, MIMO and transmit diversity, but we just
3 don't -- we want to be clear that it can't do both at the same
4 time. We don't want to accidentally agree to a construction
5 that makes it nonsensical, that it has to at least
6 alternatively indicate one or the other. Meaning they are not
7 being indicated at the same time.

8 Your preliminary construction I think captured that
9 for both of these terms without adding any unnecessary
10 additions and it avoids any disputes over whether there is some
11 sort of exclusivity and alternatively indicate that goes beyond
12 the scope of the claims and the intentions of our previous
13 construction.

14 THE COURT: All right. Thank you very much, and who
15 would like to address this regarding the defendants?

16 MR. HILL: Your Honor, this is Reggie Hill and I'm
17 going to address this on behalf of the defendants and I think
18 I'll try and treat the two terms together as Mr. Stewart did as
19 well.

20 THE COURT: Very good. We'll be dealing with eight
21 and nine then. And so you can have five minutes as well.
22 Mr. Hill, go ahead.

23 MR. HILL: Thank you very much. So we're start with
24 Slide 110. Just to set the context, Your Honor, which I
25 actually believe you have in hand, but it would be helpful for

1 some of the discussion going forward here. The title of this
2 is "Method and apparatus for Multi-carrier communication system
3 with adaptive transmission and feedback." So you've got some
4 communication system that has to adapt and we've be talking
5 about this going forward.

6 But it's helpful to keep it in the context that it has
7 to make some choices in order to be adaptive and I think these
8 claim terms get at that choice. Because if you go to the next
9 Slide 111, it's just a term there. I think we can skip to the
10 next slide, which is 112. And I've just shown here a bit of
11 context of the language that's in Claim Eight.

12 Your Honor probably realizes this, but Claim Eight is
13 a method claim. Claim 13 is an apparatus claim, but the
14 language that is at issue is basically the same for the two of
15 them. But in either case, as indicated here in Claim Eight,
16 you see the portion in green talks about this as being a
17 control message. And the way that this adaptive feedback is
18 happening according to the '941 is via a control message that's
19 going from the base station or being received by the mobile
20 station or the mobile phone.

21 So there's a message and then that message has in it
22 some transmission parameters. It's those transmission
23 parameters that are further described in the highlighted in
24 yellow language in this Slide 112 that get at the two claim
25 terms. So these are really things that have to be in a message

1 going forward.

2 If you go to Slide 113, please.

3 And so Mr. Stewart is right. The defendants started
4 this with the proposed construction that existed in the file
5 history, which included the Dell litigation, and you can see
6 that what looks like gray to me, the gray language as opposed
7 to the yellow highlighted language. The gray language is
8 basically the same between the constructions. You have the
9 yellow highlighted language that gives some differences. The
10 main difference is being this alternatively indicated language,
11 which it looks like the Court is included in Claim Nine, but
12 not in Claim Eight in terms of the preliminary construction
13 that we had.

14 But if you move to the next slide of ours. This
15 slide, Number 114, just really shows exactly the proposed
16 construction from the Dell litigation and it's exactly the
17 same, at least for this claim term eight as what was proposed
18 by -- agreed to by NEO in the Dell litigation.

19 I think you can move to the next Slide.

20 And 115 is consistent with NEO's position. NEO's
21 position has been that they agree with the Dell Construction.
22 And I think it's Mr. Stewart who intimates there's some
23 commonality between the constructions that are being given
24 here.

25 So with that, would you move to the next slide?

1 I won't dwell on it, but for the Court's benefit,
2 there's an indication of where, at least for the first term,
3 the support is in the '941 specification and you can see
4 clearly it's a choice between transmission diversity, which is
5 about improving transmission robustus.

6 And so you're sending in most cases, multiple
7 information to be received so that you guarantee its receipt
8 versus the, what we call the MIMO, M-I-M-O, schemes which are
9 used to improve transmission throughout, which means you're
10 sending information at the same time in multiple -- over
11 multiple channels so that you can improve how much information
12 is being sent in a particular time.

13 If you can move forward, Mr. Murray, that would be
14 good.

15 The alternative indicate language comes directly out
16 of the claim, where they say you indicate or, you know, which
17 the or Is between the transmission diversity schemes or the
18 multi-input-outputs, and then I would also indicate that the
19 lower language which relates really to Claim Nine, there is
20 about the corresponding channel configuration and the claim
21 language says, "Characterized by distributed subcarriers for
22 localized subcarriers in the frequency delays," really
23 represents the second choice and that's where the support is
24 for the alternative indicate language.

25 You can move forward to the next slide, please. I

1 think we can skip Slide 118 and 119 which really dealt with, I
2 think a dispute that's not actually a dispute between the
3 parties.

4 If we would go to the second term, which is Claim
5 Nine, which deals with these -- the corresponding subchannel
6 configuration, again, I want to reflect that this is a message
7 and in that message there has to be an indication of which of
8 the subchannel configuration are actually used. One that has
9 distributed carriers or localized subcarriers.

10 As a part of the construction from the Dell
11 litigation, there was some language in there to say to avoid
12 any doubt, this requires supporting both of the alternatives,
13 whether you're talking about for Term Eight or Term Nine. And
14 I see that language made it into Term Eight. It did not make
15 it into Term Nine, which the Court made more consistent, I
16 believe, with the PTAB. So there's some question in my mind as
17 to whether there might need to be some level setting or trying
18 to make them correspond more appropriately for a judge or jury.

19 But it's important that the alternative indicate
20 language be in both, and that in order for the message to be
21 able to be chosen between two alternatives, obviously, the
22 system must support both alternatives.

23 If you move forward to 121.

24 This just shows the difference between the
25 alternatives. At least it's in the initial meet and confer

1 process, NEO was not including the alternative indicates
2 language in this term, which is number nine in the Court's
3 listing of preliminary constructions, but the language is there
4 in the Court's construction, and we believe that that is
5 appropriate. We believe that the language could also be in
6 Claim Term Eight to indicate that their alternatives, both for
7 consistency and because I believe the claim language also
8 supports that.

9 If you can move forward.

10 THE COURT: Let me ask you, counsel, why so focused on
11 the word "alternative?" So in the Court's proposed
12 construction for eight, it's clearly an either/or. When you
13 say "alternatively indicate" you mean something is different
14 than either/or? I mean --

15 MR. HILL: No. I don't think it means anything
16 different, Your Honor. I think it was put there to make sure
17 that it was a choice between those two things, and I believe
18 the language -- I'm not sure in regular parlance which one
19 would be more palatable to a jury, but I don't believe -- I
20 think it's the alternative choice between those two parameters.
21 It's just stated differently in the two constructions. I don't
22 know if people will think that means that has to mean something
23 different or not.

24 THE COURT: Your main point is that you want to use
25 language such as indicates alternatively or alternatively

1 indicates or in some way or another, that they are alternatives
2 to each other so that it's clear that it's an either/or
3 situation?

4 MR. HILL: That's accurate, Your Honor. And in
5 addition to that, it should be made clear that there must be
6 support in the system for both of those alternatives. In other
7 words, it wouldn't be enough that you only supported one and it
8 indicated that one. So you have to ask the Court for both of
9 those.

10 THE COURT: All right. Thank you very much.

11 MR. HILL: If you can forward again.

12 THE COURT: You're just about out of time, so why
13 don't you wrap it up.

14 MR. HILL: All right. I think that really covers the
15 issues, Your Honor, unless you have some other questions with
16 respect to both eight and nine.

17 THE COURT: No. I think you've done a good job
18 clarifying that for me. So thank you very much.

19 Is there any rebuttal?

20 MR. STEWART: Yes, Your Honor, if I can respond
21 briefly. This is Chris Stewart.

22 May it please the Court, sorry.

23 THE COURT: Go ahead.

24 MR. STEWART: Okay. I talked over you for a minute
25 and didn't mean to. I think we understand each other. The way

1 Mr. Hill just characterized the dispute, I don't think there is
2 one. We agree that they have to be alternatives. It's one or
3 the other and that you have to support both. The dispute in
4 the briefing, which it sounds like it's no longer a dispute,
5 was whether them acting as alternatives to each other also
6 meant that the system as a whole could also not support any
7 other schemes in other contexts. We thought they were trying
8 to import this additional thing and it sounds like that's no
9 longer in dispute, in which case we have no issue on that
10 point.

11 The one other thing I'd raise is there was a dispute
12 just for Term Nine, the subchannel configuration. That was
13 addressed in the briefing about whether the indicate language
14 in the claim term requires an actual, distinct indication. You
15 recall that? I didn't hear that addressed by defendant
16 counsel, so that's no longer in dispute and we're just dealing
17 with the Court's construction as it is, then there's nothing to
18 address.

19 I just wanted to make clear that to the extent that
20 it's still in dispute, we obviously think that the subchannel
21 configuration is characterized by certain subcarriers, not
22 necessarily accompanied by a second indicator.

23 THE COURT: All right. So thank you, Mr. Stewart.

24 I did want to turn to Mr. Hill briefly. So
25 Mr. Stewart is indicating that after listening to you and

1 indicating that he sees your position as one which states that
2 as long as it's clear in the language that we use here, that
3 it's an either/or situation and that whichever of these two
4 systems is used is adequately supported, that he doesn't
5 disagree with you. Do you agree that you don't disagree with
6 him either?

7 MR. HILL: (Zoom audio muted.)

8 Okay. I was on mute, I'm off now, I'm sorry.

9 The characterized language that is not in the Court's
10 construction and what's there is that it indicates as
11 alternatives distributed subcarriers and localized subcarriers.
12 So we believe that that is accurate. I believe that that
13 addresses what Mr. Stewart was referring to.

14 But the characterized language is not there. So
15 there's certainly no dispute with what the Court has with
16 regard to the alternative indicate language in the
17 construction, the preliminary construction.

18 THE COURT: By that you mean that you like the Court's
19 proposed language and still oppose the plaintiffs' proposed
20 language, but the general description that Mr. Stewart just
21 gave, you don't dispute that; is that right?

22 MR. HILL: It's a little bit unclear to me what
23 Mr. Stewart is saying, but I know that I agree that
24 alternatively indicates language needs to be indicated
25 in -- for this choice needs to be indicated in the message as

1 specified in the Court's preliminary construction.

2 THE COURT: All right. So if I'm following you
3 correctly, what's your position regarding what we just heard
4 from Mr. Stewart, you agree that there's not a dispute anymore,
5 setting aside the precise words to be used, do you agree that
6 you look at it the same way?

7 MR. HILL: I don't think there's a dispute that I'm
8 aware of, given where we are right now, Your Honor. I think
9 the language "characterized by", is not in the construction,
10 and, therefore, the construction that the Court has given and
11 the one that was proposed by the defendants that had the
12 indicating alternatives resolved any dispute.

13 THE COURT: All right. Thank you very much.

14 MR. STEWART: May I respond briefly to that? I
15 apologize.

16 THE COURT: Sorry?

17 MR. STEWART: May I respond briefly to that just to
18 make it clear?

19 THE COURT: Go ahead.

20 MR. STEWART: This is Chris Stewart again for NEO. I
21 just want to be clear that we don't view the removal of the
22 word "characterize" as actually the Court adopting in its
23 preliminary construction the idea that there has to be a
24 separate indicator flag. So if that is still in dispute, I
25 just want to make clear on the record that we still do not

1 agree that the scope of this term requires an indicator flag
2 distinct from just the designation of the subchannel
3 configuration itself. If that's still in dispute, maybe it
4 ends up just being a factual issue that the experts battle
5 about it at trial, and you don't have to resolve it. But if
6 Mr. Hill is saying that is still a dispute and they're
7 interpreting your construction as requiring that, requiring
8 that indicator flag, I just wanted to make clear that we would
9 still dispute that and maybe we'd propose some additional
10 clarifying language in the Court's construction to the effect
11 that it is not so limited in that way.

12 THE COURT: Okay. The Court is somewhat encouraged to
13 say whatever at this point. I hear what you're saying on both
14 sides. We'll take a look at it.

15 MR. HILL: Sorry for belaboring it.

16 THE COURT: You guys are not very far apart, but okay.
17 So let's -- I think we finished ten already because
18 that was the probing signal. But 11 has some additional
19 language that's also in front of the '302 patent and that
20 language is as follows: It says, quote, a probing signal is
21 configured to occupy a portion of spectrum in the uplink
22 frequency banner, not designated for transmission of uplinked
23 control signals in the system, end quote. So the plaintiff can
24 be heard on this. And so go ahead, sir.

25 MR. BLOMQUIST: Yeah, Your Honor. Good afternoon now.

1 This is John Blomquist for Neo Wireless. And I'm grouping
2 these terms together and I just want to make sure that I am
3 grouping them correctly. The defendants have grouped them
4 together as, quote, antecedent basis terms, and the -- I'll be
5 brief on it. It's essentially they just want to import and add
6 words from the preamble throughout the specification -- it's
7 not the specification. The claim, excuse me, based on the
8 agreed construction and the fact that the preamble is limiting
9 and the sole basis for this is proposed is that it is to aid
10 the jury and results in curing jury confusion. We see it as
11 the exact opposite. It simply is going to make it hard for
12 people on the jury, especially when it be the judge's role and
13 not the role of the parties or experts to instruct on how to
14 effect antecedent basis in the claims, for example.

15 THE COURT: I'll give you five minutes.

16 MR. BLOMQUIST: Your Honor, that's really all I had to
17 say about it.

18 THE COURT: Okay. Very good.

19 And who would like to respond regarding this language
20 that we have in 11?

21 MR. TAPPARO: Good afternoon, Your Honor, it's Robert
22 Tapparo for FCA.

23 THE COURT: Go ahead.

24 MR. TAPPARO: Like opposing counsel, I want to keep my
25 argument short. Our construction is clarifying for the jury

1 something that both parties actually agree on. During
2 briefing, both parties have agreed that the preamble is
3 limiting and NEO doesn't dispute the recitations as you -- let
4 me share my screen really quick. This will illustrate my
5 point. Recitations of broad system in red in the claim really
6 refer back to the orthogonal treatment of the individual
7 multiplexing or OFDM system. All defendants' proposed
8 construction is trying to do is clarify that each recitation of
9 "the system," is just referring back to the preamble, which
10 regardless of whether or not the preamble is limiting in this
11 case, which it is, both parties agree to that. This is an
12 antecedent basis rule to where "the system" refers back to the
13 Orthogonal Frequency Division Multiplexing System. That's the
14 extent of our argument and we just believe that this would
15 clarify the point for the jury because they might not
16 necessarily understand the antecedent basis rule or "the
17 system" refers back to the OFDM system. Thank you, Your Honor.

18 THE COURT: Thank you very much. I appreciate hearing
19 from both sides on that one.

20 So let's move on to our Number 12 and that's also from
21 the '302 patent. It's Claim 23. And that phrase is as
22 follows: Quote, A receiver configured to receive a request
23 from a probing signal from a base station in the system.

24 So that's a disputed term and I guess I'll hear from
25 either Mr. Stewart or Mr. Blomquist.

1 MR. BLOMQUIST: Yes. This is **Bill Blomquist again
2 for NEO Wireless. So just to be clear on the record, Terms 11,
3 twelve and 13 and both my brother's side can tell me, you know
4 if he disagrees. I believe we're putting those together again,
5 Claim Term 11, 12 and 13 all are being changed or proposed to
6 be changed by defendants for the same reasons. And I guess
7 given the opportunity again, just maybe in reply to state that
8 the basis somehow, the antecedent basis rule, that rule is a
9 rule of validity. There's no dispute here that "the system" as
10 in the claims is somehow invalid or not specific as to what
11 system it's referring to as far as, you know, "the system."

12 I see the basis of that is clear. And so to require
13 this -- there's no requirement in the antecedent basis rule to
14 add this language. That assertion is not a basis to adjust
15 these claims as proposed.

16 THE COURT: Got you. And you're correct, these are
17 all together in one. And so let's just have whatever response
18 is made as to this issue addressing both 11, 12 and 13.

19 MR. TAPPAN: Your Honor, I have nothing further to
20 say. I think my last argument captured our point. Thank you.

21 THE COURT: Thank you, sir. Very good.

22 So we're gaining on it here and so we're at Number 14
23 at this point and that phrase is from the '512 patent and it's
24 Claims 15 and 23 and says, quote: "Whether the first and
25 second pilot subcarriers must be received in at least one of

1 the time slots."

2 So who would like to address this?

3 MR. HAMAD: Good afternoon, Your Honor. This is
4 Hamad Hamad again for NEO.

5 THE COURT: Good afternoon.

6 MR. HAMAD: I think I'll need about five minutes for
7 this, Your Honor, or less.

8 I think that the essential dispute here is what does
9 the plain language of the claim mean? Your Honor, our view of
10 this is that the claim term should have its plain meaning, but
11 just from kind of the meet and confer process, and as, you
12 know, just from prior litigation, we suspected that there might
13 be some difference of opinion about what that claim language
14 meaning is. So we proposed this clarifying construction that
15 adds the word "same" before time slot in view of a person of
16 ordinary skill in the arts' understanding of the plain meaning
17 of the claim language.

18 And so NEO'S expert testimony is the only record
19 evidence of what a person's understanding of the term would be.
20 Mr. Alberth explains that pilots and other signals are
21 necessarily going to be transmitted in some time slot. So when
22 you see the claim language, the first of the plurality of
23 subcarriers and the second plurality of subcarriers would be
24 understood to mean that there is at least one time slot where
25 both of those carries are transmitted and then subsequently

1 received at least one time.

2 He explains this in conjunction with Figure Five, and
3 then in reply or in response from the defendants, there was
4 this argument that Figure Two would be excluded or would
5 contradict the proposal. I would just like as a background,
6 Figure Two is just showing the basic structure of a
7 multi-carrier signal. There is only one set of pilot
8 subcarriers here. So it doesn't show something inconsistent
9 with it, and it wouldn't be excluded by the proposal because
10 NEO's proposal doesn't require that both pluralities of the
11 subcarriers are received in every time slot together, just in
12 at least one of the same time slots. So you could have
13 instances of a time, such as in Figure Two, where only one
14 pilot subcarriers are transmitted and subsequently received.

15 Defendants also had an argument that Claim 19
16 contradicts NEO's proposal as a claim differentiation type of
17 argument. And, again, in unrebutted expert testimony, the only
18 record evidence of a POSITA's understanding of these terms, he
19 explains that a time slot could have smaller divisions such as
20 time symbols. So independent Claim 15, the same time slot
21 would be a higher level and you could have two carriers within
22 the same time slot, but not at the same time symbol.

23 Claim 19 would then provide -- you could, for example,
24 have them at the same time symbol.

25 I think that's all I have on this, Your Honor. Thank

1 you.

2 THE COURT: Who would like to respond on behalf of the
3 defendants?

4 Thank you, Mr. LeRoy.

5 MR. LEROY: Good afternoon, Your Honor. This is John
6 LeRoy, if I may briefly respond.

7 THE COURT: Mr. LeRoy, go ahead.

8 MR. LEROY: So before we get into the slides, I'd like
9 to talk about the *Phillips* decision in the Federal Circuits
10 *Onbonk* construction, that when we're going to construe a claim,
11 we don't start with an expert's opinion. We start with the
12 claims and then we look at the specification. And, of course,
13 the Court can also take into account expert testimony, but it
14 cannot be at odds with the specification.

15 And I start there because the first and threshold
16 evidence presented by NEO is its expert extrinsic opinion and I
17 think that's just an important starting point. And I would
18 like to go through the order of the procedure that the Federal
19 Circuit instructed that we do, which begins with a claim. And
20 if I may share my screen, hopefully this works.

21 THE COURT: So your position is that it should be the
22 plain and ordinary meaning, correct?

23 MR. LEROY: Correct. This is in response to NEO's
24 proposed construction.

25 THE COURT: Yes.

1 MR. LEROY: And so looking at the claim -- by the way,
2 Your Honor, the defendants agree with the Court's preliminary
3 construction, just to make that clear on the record.

4 This slide here that I have before Your Honor shows
5 that what NEO is doing here is not construction, they're not
6 taking a word in the asserted independent claim and
7 interpreting it. They're adding a word. So on the left we
8 have the actual claim language as printed in the patent and on
9 the right we have their proposed construction and, of course,
10 the only new word is "same."

11 As Your Honor well knows, when we add words to a
12 claim, we're narrowing them because the Federal Circuit has
13 instructed that all claim terms have meaning. So when you add
14 new terms, you inherently narrow the scope of the claim. So
15 when we look at the claim language itself as *Phillips*
16 instructs, we see right at the threshold, we're adding a new
17 word, not necessarily interpreting an existing word.

18 In this case, to the extent there's, you know, any
19 confusions over whether the word "same" belongs in the
20 independent claims or not, the other claims answer that
21 question, resolve that potential confusion.

22 *Phillips* instructs us, again, this is *Onbonk*, this is
23 the law of the land if we're going to construe patent claims.
24 *Phillips* states that if a term appears in a dependent claim and
25 in our case, it's dependent Claim 19, we have a presumption

1 that that term is not present in the independent claim, which
2 in our case, are Claims 15 and 23.

3 So we have a presumption that NEO neither acknowledges
4 nor responds to. We do. But I think it's important at the
5 threshold that just looking at the other claims of the patent
6 as *Phillips* instructs, undermines NEO's proposed construction,
7 but beyond the fact that we are entitled to this presumption,
8 which resolves this issue on its own, the actual specification
9 supports the -- supports the presumption. This is not a case
10 where the patent exclusively describes one approach in this
11 case.

12 The patent does not exclusively state that in all
13 cases both cell-specific and common subcarriers must be
14 transmitted at the same time. NEO cites no controlling
15 evidence of that.

16 And Figure Two, as we have advanced in our briefing,
17 shows why. It's because the inventors when they wrote this
18 patent, contemplated something broader. So Figure Two, to be
19 specific, is an example of at the same time transmission. So
20 Your Honor, all those vertical arrows are at the same time.
21 And each referenced a P -- and I noticed that my yellow
22 highlighted somehow got mixed up along the way.

23 But each reference to P there, being a P arrow, if you
24 will, being transmitted at the same time. This example is not
25 limited to one type of P or another type of P. Okay. This is

1 broad. This example in Figure Two is broad just like Claim
2 One. And it does not require -- it requires pilot signals, but
3 not both types being communicated at the same time.

4 And if we turn to Figure Five, this is the example
5 that NEO points to. Figure Five is an example that -- and this
6 example does show both common pilot signals. Those are the
7 arrows on the right with the little C on top and cell-specific
8 subcarriers, those have the little S. This Figure Five does
9 show them being transmitted at the same time, but that's not a
10 requirement of the system. The description of this Figure Five
11 never states it's a requirement of the system. And when we
12 look at what the description of Figure Five is talking about,
13 it's something completely different. It's talking about
14 aligning frequency. So granted, this is a snapshot at the same
15 time of one example, but the whole purpose of this figure is
16 just to show that in all cases the common signals align in
17 frequency, they're directly above each other. And in some
18 instances, the cell-specifics don't align. They're not
19 necessarily above each other. But that's a frequency issue,
20 not a timing issue.

21 So in addition to the fact that the patent nowhere
22 requires both to be transmitted at the same time, it's a
23 possibility for sure. This figure is directed to an entirely
24 different concept.

25 Recently, as Your Honor is well aware, the parties

1 have submitted petitions for interparties review at the United
2 State Patent and Trademark office, and this patent, the '512
3 patent, is one of the patents in which the patent office
4 elected to undertake review. And in doing so, on May 12th of
5 this year, the patent office rejected NEO's proposed
6 construction stating, as defendants do, and as Your Honor has
7 already determined, that the plain language of the independent
8 claims is broader.

9 We don't need to add a new word that expressly narrows
10 the claim beyond how they were originally printed.

11 THE COURT: All right.

12 MR. LEROY: I think that's it.

13 THE COURT: So you're at the end of your time here.

14 Did you want to -- I know we have to discuss what you just said
15 on the slide here as our last term, but we'll ferret that out.
16 I'll say what it is. That's the 15th term we been dealing with
17 here. It's also from the same '512 patent found in the same
18 claims and the phrase is, "Second pilots of a second type."
19 And that is a phrase that plaintiff asking the Court to
20 construe.

21 So who would like to address this for the plaintiff?

22 MR. HAMAD: Thank you, Your Honor. This is Hamad
23 Hamad again for NEO.

24 THE COURT: Go ahead.

25 MR. HAMAD: Thank you. May I briefly respond to one

1 point on the last term, Your Honor?

2 THE COURT: You may.

3 MR. HAMAD: Thank you. There was a statement that we
4 didn't address claim differentiation. Again, our reply, 133 at
5 13, 14, Mr. Alberth's declaration, paragraph 49, we had it up
6 on the screen. So I don't understand why that -- I guess
7 understanding of our position was taken, but that's something
8 that we did address.

9 On *Phillips* we did actually start with the claim
10 language, just like *Phillips* said. Plain language though is
11 not just as to anyone off the street. It's to a person of
12 ordinary skill in the art. Record evidence is only from NEO on
13 what that term means and the rest of the defendants' arguments
14 are just attorney argument.

15 So thank you, Your Honor. I'm ready to proceed to the
16 second parlance, if I may.

17 THE COURT: Go ahead, sir.

18 MR. HAMAD: Thank you, Your Honor. The second
19 parlance of the second type, the defendant's proposal is
20 essentially a combination of disclaimer and lexicography. And
21 the dispute is whether they have established just the first
22 threshold step of this claim to get there. We note that the
23 Court's preliminary construction adopts a less restrictive
24 characterization of common pilots from the specification.
25 Respectfully, we don't think this disclaimer applies in the

1 first place, especially that second pilot should be limited to
2 common pilot.

3 Sorry. Let me share this with you again.

4 (Document displayed)

5 MR. HAMAD: So this is what I was describing. The
6 chain language itself doesn't recite the phrase, "common
7 pilots." It says "second pilots of a second type." So to get
8 from the claim language of second pilots to common pilots,
9 defendants' proposal requires that you have disclaimer, such
10 that second pilot to the second pilot are only limited to
11 common pilot. Once there, at Step one, their Step Two is then
12 they would need a type of definition or lexicography to insert
13 a particular description or characterization from the
14 specification. And they just don't meet the threshold question
15 on disclaimer.

16 We've talked about some of these cases, but once again
17 *Continental* also goes back to *Libel Florsheim*, even when the
18 specification describes only a single embodiment and that
19 without more is not a disavow of claim scope. And this is the
20 heart of their argument, is that this specification only
21 describes common pilot and it should be limited to that because
22 of the specification, but that applies in the face of the
23 Federal Circuit saying otherwise.

24 We also have --

25 THE COURT: Why are you talking about this?

1 MR. HAMAD: I'm sorry?

2 THE COURT: The second pilots of a second type meaning
3 what? What are they? If they're not common, what are they?

4 MR. HAMAD: They can be common. We have expert
5 testimony on this explaining that a person of ordinary skill in
6 the art would understand that other noncell specific pilots
7 could be used alongside cell-specific pilots and it gives two
8 examples, the antenna specific pilots and mobile station
9 specific pilots. And the specification, I don't have it on
10 this, but this specification also described the extension of
11 this system into an area with multiple antennas. And so,
12 again, that would be consistent with Mr. Alberth's declaration
13 that a person with ordinary skill in the art would understand
14 that there's other noncell specific, noncommon pilots that
15 could be used with their invention.

16 That's all I have on this term, Your Honor. Thank
17 you.

18 THE COURT: Very good.

19 And who would like to address this for the defendants?

20 MR. LEROY: Your Honor, if I may, John LeRoy for the
21 defendants on this term.

22 THE COURT: Go ahead.

23 MR. LeROY: So just like *Phillips* instructs, Your
24 Honor, the defendants start with the claim language itself. As
25 the Court is well aware, the claim defines the first type of

1 cell-specific, but then we have the second type, and based on
2 the language of the claim, we know at least one thing, whatever
3 that second type is, it can't be cell-specific.

4 THE COURT: Okay. Thank you. Just to tell you,
5 you've got six minutes. So go ahead.

6 MR. LeROY: Thank you, Your Honor. If it's not
7 cell-specific, then it's inherently cell-common. Consistent
8 with Your Honor's preliminary construction, the second type is
9 common to a group of cells or at least two or more cells.

10 THE COURT: What do you have to say about what
11 Mr. Hamad was just saying regarding antenna specific or
12 global -- I think we said base station or specific or stuff
13 like that.

14 MR. LeROY: Right. Thank you, Your Honor. Once again
15 he's citing expert testimony, extrinsic evidence about examples
16 that are not stated in the specification. If the specification
17 had actually recited the examples alternatives, if you will,
18 that their expert cited, this would be a very different
19 conversation.

20 But in contrast to actually reciting other examples,
21 this specification doesn't. As I think is undisputed, this
22 specification discloses only two types of pilot signals, the
23 common -- I'm sorry. The cell specific recited in their
24 previous limitation and then these common pilots. But beyond
25 just describing them or mentioning them, the patent

1 consistently -- and we have four examples on the screen before
2 Your Honor -- describes common pilot subcarriers or common
3 pilot signals as an aspect of the invention. These are not
4 possibilities, options. This is the invention.

5 This is not beyond ubiquitous. It's in the title, the
6 abstract. And I think almost every example or other -- I'm
7 sorry. Every recitation of common pilot is not an example but
8 it is the invention.

9 And the cases that we've heard talked about today, the
10 *Continental* case and also NEO's counsel referenced the *Libel*
11 *Florsheim* case, those are two federal circuit cases that each
12 do concern reference to the invention, but they are not this.

13 In the *Continental* case, which has been identified
14 several times today, there open-ended terms were used. You
15 know, one technique is an example. The invention may be
16 implemented, using the word term may or can be implemented, can
17 be.

18 We don't have may and can be in the '512
19 specification. We have definitive, declarative, the invention.
20 So in a nutshell, Your Honor, the intrinsic record, the
21 intrinsic evidence here is clear and unwaivering and would
22 trump any extrinsic evidence identifying examples that this
23 patent never contemplated.

24 We cite the same issue, which is how does the federal
25 circuit treat the usage of the invention in the context of

1 claim construction. We have five examples here that we think
2 align with the facts of our case unlike the facts of the two
3 cases that NEO has cited and presented in the slides.

4 And if Your Honor doesn't have any questions, I think
5 that is all I have.

6 THE COURT: Thank you, Mr. LeRoy. I appreciate that.

7 And is there any rebuttal from Mr. Hamad?

8 MR. HAMAD: Yes, Your Honor. Two brief points. The
9 first point is the term "pilots" is a term of understood in the
10 art. It's understood to a person of ordinary skill in the art.
11 So they would also understand that there are different types of
12 pilots. The only record evidence comes from Mr. Alberth's
13 declaration. They chose not to rebut it.

14 *Phillips* itself says when you are looking at a term,
15 you are looking at it in the context and understanding of a
16 person of ordinary skill in the art.

17 I want to comment on the specification excerpt
18 because --

19 THE COURT: Can I just? So how is anybody supposed to
20 know what is meant by pilots of a second type? In the first
21 type it's so specific. So you just want pilots of a second
22 type to be completely open-ended with no understanding
23 whatsoever as to what it is not even that it's for common
24 pilots.

25 MR. HAMAD: I don't think I would agree with that

1 respectfully, Your Honor. One, it could contemplate and put in
2 common pilots for sure. But then also a person of ordinary
3 skill in the art would understand, as the specification
4 describes, these inventions are not in a vacuum. They're
5 described in the context of these particular wireless networks
6 like OFDMA. And there are specifications in the art and
7 background cited on the face of the patent that describes
8 different kind of pilots that are not limited to just common
9 pilots.

10 And we have an expert in the field explaining that
11 from a perspective of a person of ordinary skill in the art
12 there are at least these two other examples. Antenna specific
13 and at mobile station specific pilots. And then at least with
14 respect to antenna specific, it also is consistent and aligned
15 with the specification's description of the extension of the
16 invention into multiple antenna system.

17 So it's not just kind of completely open-ended, but a
18 person of ordinary skill in the art would understand, and our
19 position is, would not be limited to a just common pilot.

20 MR. LeROY: Your Honor, if I may respond briefly?

21 MR. HAMAD: Your Honor, if I may finish my rebuttal?

22 THE COURT: Yes, Mr. Hamad, you may finish.

23 MR. HAMAD: Thank you.

24 The specification excerpts that were put on
25 defendant's slide they said things like "aspects of this

1 invention, aspects of the invention." It was not the
2 invention, all embodiments of the invention.

3 And the *Continental* case included arguments from
4 defendant that there were descriptions and disclosures of the
5 present invention and even that to the federal circuit was not
6 enough. The cases that they cite we had actually addressed in
7 our reply brief but those are disclaimer cases. Verizon, in
8 particular, was distinguished in *Continental*.

9 Thank you, Your Honor.

10 THE COURT: Thank you.

11 Okay. And so, Mr. LeRoy?

12 MR. LeROY: Thank you, Your Honor.

13 Just to pick up on the last point that was made. Our
14 specific-- the '512 specification does indeed describe the
15 common pilot signal as an aspect of the invention, but it is
16 just that, an aspect of the invention. There may be other
17 aspects, but in all cases the invention includes that aspect.

18 But, Your Honor, in questioning NEO's counsel raised a
19 very important point and that is the public notice function of
20 patents and patent claims.

21 You know, the public is going to review the intrinsic
22 record to understand what the claims say and how they arise in
23 the context of the written description. Here we have an expert
24 who citing nothing at all, not citing prior art on the face of
25 the patent, we have an expert who identifies other potential

1 signals not described in the patent and this is the first I've
2 ever heard that there are prior art references cited on the
3 face of the patent that might support the construction.

4 I don't know if there are or there aren't because that
5 has not been a part of this record to my knowledge. It has not
6 been a part of the briefing or the expert analysis.

7 But even if it was true, which reference? How is the
8 public to know that it's supposed to talk to NEO's expert or
9 which prior art reference it's supposed to read to figure out
10 the scope of the claim. That's why *Phillips* puts extrinsic
11 evidence at the bottom.

12 Thank you, Your Honor.

13 THE COURT: Thank you. And our official timekeeper,
14 Mr. Weissburg indicates that you have used up almost all of
15 your time. I think you had about maybe 10 seconds left for the
16 defense side. So very good.

17 And the plaintiffs, I think, might have had a little
18 bit more time than that, but they have perhaps were just a
19 little bit more economical in their presentations.

20 So I think that covers everything that we have with
21 respect to all of the claims that were before the Court for the
22 construction. And let me just confirm that, Mr. Stewart, do
23 you think we have covered everything that we need to cover?

24 MR. STEWART: If you'd like to revisit any term, I'd
25 be happy to wax poetic a little longer, but otherwise I think

1 we have covered everything.

2 THE COURT: Okay, thank you. And I don't think it's
3 necessary in light of everything you have said already and all
4 also all the briefing that we have and the matters that are on
5 the record.

6 And so all of that is taken into account in making
7 this decision. And so on behalf of the defendants, is there
8 anything defendant that believes there is anything else that we
9 are supposed to cover that we have not covered during our
10 hearing.

11 MR. HERRIGES: Nothing further, Your Honor, from
12 defendant's perspective.

13 THE COURT: Thank you, sir. Very good. All right.
14 So I want to thank counsel for your presentations today. All
15 of you have made your oral arguments. It's been very helpful
16 to the Court. I know that this is complicated material.
17 Perhaps not as complicated to you as it is to me, but I have
18 enjoyed hearing from you trying to grapple with all of this and
19 continue to do so. I'll take this under advisement for now and
20 we will issue an order that will construe these terms that the
21 parties have requested.

22 So is there anything further that we need to address
23 or can we be adjourned?

24 I don't see anybody indicating that there's anything
25 further. Then I will ask Mr. Weissburg to go ahead and recess

1 the court and give my thanks to all of you for all of your hard
2 work you put into the case.

3 THE LAW CLERK OF THE COURT: The Court is now in
4 recess.

5 (At 1:29 p.m., matter concluded.)

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C E R T I F I C A T E

I, Darlene K. May, Official Court Reporter for the United States District Court, Eastern District of Michigan, do hereby certify that the foregoing is a true and correct transcript, to the best of my ability, from the record of proceedings in the above-entitled matter. I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

July 5, 2023
Date

/s/ Darlene K. May
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